CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905

No. 70.

GEORGE O. CAMPBELL, BENJAMIN F. CAMPBELL, CORLISTA E. JESS, AND ALONZO E. CAMPBELL, HEIRS-AT-LAW OF CORNELIA E. CAMPBELL, DECEASED, PLAINTIFFS IN ERROR,

vs.

THE STATE OF CALIFORNIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED JULY 29, 1904.

(19,430.)

(19,430.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 70.

GEORGE O. CAMPBELL, BENJAMIN F. CAMPBELL, CORLISTA E. JESS, AND ALONZO E. CAMPBELL, HEIRS-AT-LAW OF CORNELIA E. CAMPBELL, DECEASED, PLAINTIFFS IN ERROR,

vs.

THE STATE OF CALIFORNIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

INDEX.

	Original.	Print.
Writ of error (copy)	1	1
Transcript from superior court of the city and county of San Francisco	3	2
Decree of distribution	3	2
Notice of appeal	6	4
Stipulation as to record on appeal, &c	7	4
Opinion, November 27, 1903	8	5
Concurring opinion	13	8
Judgment, November 27, 1903	13	8
Order vacating judgment and directing re-argument	13	9
Opinion, June 18, 1904	14	9
Judgment, June 18, 1904	15	10
Assignment of errors	16	10
Petition for writ of error	18	11
Order allowing writ of error	23	15
Citation (copy)	24	16
Bond	25	16
Clerk's certificate	27	17
Writ of error (original)	28	18
Citation (original)	31	19
Acceptance of service of citation	32	20

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 7, 1905.

1 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the justices of the supreme court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in said supreme court of the State of California, before you, or some of you, being the highest court of law or of equity of the said State in which a decision could be had in that certain proceeding in the matter of the estate of Cornelia E. Campbell, numbered in your records as San Francisco number, 3293, wherein was drawn in question the validity of a statute or of an authority exercised under said State on the ground of its being repugnant to the Constitution or laws of the United States, and the decision was in favor of such validity, or wherein was drawn in question the construction of a clause of the Constitution, or of a statute of or commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said Constitution, statute or commission, a manifest error has happened, to the great damage of the plaintiffs in error, George O. Campbell, Benjamin F. Campbell, Corlista E. Jess, and Alonzo E. Campbell, heirs at law of said Cornelia E. Campbell, deceased, as by the record appears, we being willing that error, if any has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 16 day of September, 1904, in the said

2 Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States the 19th day of July, in the year of our Lord, one thousand nine hundred and four.

SOUTHARD HOFFMAN,
Clerk of the Circuit Court of the United States in and for the Ninth Judicial Circuit and Northern District of California.

Allowed this 22nd day of July, A. D. 1904.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

I hereby certify that a copy of the foregoing writ of error was on the 23d day of July, 1904, lodged in the clerk's office of the said supreme court of the State of California for the said defendant in error.

FRANK C. JORDAN,
Clerk of the Supreme Court of the State of California,
[SEAL.] By I. ERB, Deputy.

Filed Jul- 23 1904

FRANK C. JORDAN, Clerk,
By I. ERB, Deputy.

3 Transcript on Appeal from the Superior Court of the City and County of San Francisco, State of California.

In the Matter of the Estate of CORNELIA E. CAMPBELL, Deceased.

Decree of Distribution.

George O. Campbell, Benjamin F. Campbell, Corlista E. Jess, and Alonzo E. Campbell, having filed herein their petition for the distribution to them of the estate of said Cornelia E. Campbell, deceased, and having at the same time filed herein their final account, and notice of the settlement of said account in the manner and form prescribed by law having been given, which said notice stated that a petition for final distribution of said estate was filed with said account, and the matter having been set by the clerk of this court for hearing on this the 2nd day of December, 1901, and having come regularly on for hearing before me, Honorable J. V. Coffey, judge, presiding in department 9. of said court on this day, it was proved at said hearing:

1. That Cornelia E. Campbell dies intestate in the city and county of San Francisco, State of California, of which she was a resident at the time of her death, on the 15th day of December, 1900.

2. That at the time of her death said decedent was an unmarried woman, and left surviving her no husband, ancestor, or issue; that her next of kin are, and at the time of her death were, George O. Campbell, Benjamin F. Campbell, and Alonzo E. Campbell, her brothers, and Corlista E. Jess, her sister, and that said dece-
4 dent left surviving her no other brother or sister and no child or descendant of a deceased brother or sister; that said next of kin are all residents of the State of California.

3. That by an order of this court duly given and made herein, Benjamin F. Campbell, George O. Campbell, and Corlista E. Jess were appointed administrators and administratrix of said estate and qualified as such, and on the 31st day of December, 1900, letters of administration of said estate were issued to them, and they have ever since acted as such administrators and administratrix.

4. That said estate was duly inventoried and appraised in the

manner provided by law by the appraisers appointed by this court, two sets of appraisers having been appointed, one to appraise the property of said estate in the county of Santa Cruz State of California, and the other to appraise the property of said estate in the city and county of San Francisco, State of California,—all of said estate now known or discovered having been in said two counties.

5. That on or about January 3rd, 1901, this court duly gave and made an order directing that notice to the creditors of said decedent to present their claims be published by said administrators and administratrix once a week for four (4) weeks; that said publication was commenced on or about January 5th, 1901 and was made as directed as aforesaid, and requested said creditors to present their claims to said administrators and administratrix at a place in the city and county of San Francisco, State of California therein designated, within ten months after the first publication of said notice, and on November 9th, 1901, this court duly made and gave an order establishing that due notice to the creditors of said estate to present their claims had been given, which said order was filed and entered in the minutes of this court and recorded.

5 That the time for the presentation of claims had expired prior to the filing of said petition for distribution and of said final account, and that all claims arising out of funeral expenses of said decedent have been paid, and that there are but two unpaid claims which have been presented against said estate, and that there are sufficient funds in the hands of said administrators and administratrix to pay the same, and this court has made an order for the payment thereof by them.

5. That said estate is now in a condition to be closed.

6. That $488.70 is due for collateral inheritance tax.

7. That the taxes on the personal property of said estate for the fiscal year ending June 30th, 1902, have been paid, as well as all the taxes now due on all the other property of said estate.

It is therefore ordered, adjudged and decreed that George O. Campbell, Benjamin F. Campbell, Alonzo E. Campbell, and Corlista E. Jess is each entitled to one-fourth (¼) of the moneys of said estate left in the hands of said administrators and administratrix, as shown by the final account, reserving however, the necessary expenses for closing said estate and paying the debts ordered this day to be paid by this court, and to an undivided one-fourth (¼) interest in all other property of said estate of Cornelia E. Campbell, deceased, whether known or unknown, discovered or undiscovered, or whatever the character of said property.

And it is ordered, adjudged and decreed, that said administrators and administratrix do accordingly distribute and deliver over to said George O. Campbell, Benjamin F. Campbell, Alonzo E. Campbell and Corlista E. Jess, each, one-fourth (¼) of the residue of the moneys shown to be in their hands by their final account, after paying the debts ordered this day to be paid, and reserving

6 six dollars ($6) which is hereby estimated to be the amount necessary for the expense of closing said estate.

And it is further ordered, adjudged, and decreed that said administrators and administratrix do deliver over and distribute to said George O. Campbell, Benjamin F. Campbell, Alonzo E. Campbell, and Corlista E. Jess, each, an undivided one-fourth (¼) of all other property of said estate.

Done in open court this 2nd day of December, 1901.

J. V. COFFEY, Judge.

Endorsed: Filed, Dec. 2nd, 1901. Wm. A. Dean, clerk, by Carl W. Mueller, deputy clerk.

Notice of Appeal.

In the Superior Court of the City and County of San Francisco, State of California.

In the Matter of the Estate of CORNELIA E. CAMPBELL, Deceased.

George O. Campbell, Benjamin F. Campbell, Corlista E. Jess, and Alonzo E. Campbell, hereby appeal to the supreme court of the State of California from that portion of the decree of distribution made by the superior court of the city and county of San Francisco, State of California, in said estate, which directs the payment of a collateral inheritance tax, and from that part thereof only. Said decree was entered at large on April 2, 1902.

FROHMAN & JACOBS,
Attorneys for George O. Campbell, Benjamin F. Campbell, Corlista E. Jess, and Alonzo E. Campbell, Appellants.

7 To the treasurer of the city and county of San Francisco, State of California, and to the People of the State of California, and to the district attorney of the city and county of San Francisco, State of California, and to the attorney general of the State of California.

Endorsed: Received copy of within appeal from portion of decree of distribution this 22nd day of April, 1902. Tirey L. Ford, att'y general; Wm. M. Abbott, deputy att'y gen'l; L. F. Byington, dist. att'y; J. Harris, ass't dist. att'y. Filed: April 22, 1902. Albert B. Mahoney, clerk, by John J. Boyle, deputy clerk.

Stipulation.

In the Superior Court of the City and County of San Francisco, State of California.

In the Matter of the Estate of CORNELIA E. CAMPBELL, Deceased.

It is hereby stipulated that the foregoing decree of distribution and notice of appeal may constitute the record on appeal herein,

and that all matters relating to the correctness of the order of the superior court directing the payment of a collateral inheritance tax, which is to be the only question raised on said appeal, are sufficiently presented by such record and the following stipulation.

It is further stipulated that the amount of property distributed to each of the distributees named in said decree of distribution exceeded the sum of one thousand dollars. ($1000.00).

8 It is further stipulated that an undertaking on appeal herein in due form has been properly filed with the clerk of the superior court of the city and county of San Francisco, State of California, and the foregoing are correct copies of the papers of which they purport to be copies.

Dated July 16th, 1902.

FROHMAN & JACOBS,
Attorneys for Appellants.
TIREY L. FORD,
Attorney General of the State of California.
LOUIS F. BYINGTON,
District Attorney for the City and County of
San Francisco, State of California.

Filed Jul- 28 1902

FRANK C. JORDAN, Clerk,
By W. E. BOODY, Deputy.

San Francisco. No. 3293. In Banc. November 27, 1903.

In the Matter of the Estate of CORNELIA E. CAMPBELL, Deceased; George O. Campbell *et al.*, Appellants.

This is an appeal from that portion of the decree of distribution in the above entitled estate, providing for the payment of inheritance taxes. The estate was distributed to the brothers and sisters of the deceased, and upon the appeal the sole question is, whether or not the amendment of 1899 to the collateral inheritance tax law is constitutional. (Stats. 1889, 101.)

The first point made by the appellants is that the body of the act does not conform to the title in this, that, while the title of the act designates it as an act to amend the act of 1897, the body of the act in fact amends an act of 1893. The title is as follows: "An

9 act to amend an act entitled, 'An act to amend an act entitled, "An act to establish a tax on collateral inheritances, bequests and devises, to provide for its collection, and to direct the disposition of its proceeds," approved March 9, 1897.' The introductory portion of the first section of the act is as follows: "Section one of an act entitled, 'An act to establish a tax on collateral inheritances, bequests and devises, to provide for its collection, and to direct the disposition of its proceeds, approved March 23, 1893,' approved March 9, 1897, is hereby amended so as to read as follows:" Section

one of the act of 1893 was amended in 1897, and the title of the amending act of 1897 is correctly quoted in the title to the act of 1899; but it will be observed that in the introductory clause of section one of the act of 1899, above quoted, it attempts to quote the title of the act of 1897, but omits the first clause thereof, to wit, the words, "An act to amend an act entitled," and begins with the second clause, as follows "An act to establish a tax," etc. It is manifest that this is a mere clerical error. The defect is not in the title, but in the body of the act. If the act can be given a constitutional construction which is reasonable, and which will make it constitutional, that construction must prevail. Looking to the entire body of the amendatory act, it cannot reasonably be construed otherwise than as an amendment of the act of 1897. The clerical error must, therefore, be disregarded, and the act held valid.

Another objection is that the act is unconstitutional because it does not comply with that portion of section 24 of article IV requiring the act revised or section amended to be re-enacted and published at length as revised or amended. The only portion of the act which is amended is section one thereof, and the whole of that section is republished at length in the amending act of 1899. This is all that is required by the constitution. Where the title of an act indicates that it is an amendment to the entire act, but in fact the amendment made is all comprised in a single section thereof, it is not necessary to republish the entire act. It is a sufficient compliance with the constitutional requirement if the section which is amended is republished at length as amended.

The most urgent contention of the appellants is that the act is unconstitutional because it makes an unlawful discrimination between brothers and sisters and other parties mentioned therein, or, to state the proposition exactly, because it imposes a tax upon the brothers and sisters of deceased persons, while at the same time exempting from taxation the wife of a son, the widow of a son, and the husband of a daughter. There have been many decisions in this court upon the general question involved. The leading case upon the subject is the City of Pasadena *v.* Stimson, 91 Cal., 249, in which case the general principle was laid down that a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural, or intrinsic, or constitutional distinction. A further qualification has been made in the case of Darcy *v.* Mayor, 104 Cal., 642, to the effect that the classification must not be arbitrary for the mere purpose of classification, in order that legislation really local or special may seem to be general, but that it must be for the purpose of meeting different conditions naturally requiring different legislation. We are of the opinion that this case comes within the first rule and not within the qualification last stated. The statute in question imposes an inheritance tax upon all the collateral relations of the deceased, and exempts from taxation the father, mother, husband, wife, lawful issue, and adopted children, and any lineal descendant of the deceased

11 born in lawful wedlock. The distinction as to inheritances between those of the direct line and collateral relations is a natural distinction, and is sufficient to justify the legislature in imposing a different rule on this subject with respect to each. (The Estate of Wilmerding, 117 Cal., 281.) It also exempts the wife or widow of a son, and the husband of a daughter, who are strangers to the blood, and who, under our statute of succession, do not inherit. Consequently, the exemption in these latter cases can apply only to bequests and devises. The class composed of sons-in-law and daughters-in-law, though not of the blood of the testator, are very closely related by affinity, and we cannot interfere with the legislative discretion and say that the distinction is not natural. It is sufficient, in our opinion, to justify the legislature in exempting these persons from the tax.

It is claimed that the act is unconstitutional because it imposes a tax upon bequests and devises to persons not of kin to the testator; that is, upon all strangers to the blood, other than the wife or widow of the son or husband of the daughter, and that these classes of persons, upon whom the tax is thus imposed, are not embraced within the terms of the title of the act. This defect in the act would, of course, not affect the appellants, here directly, they not being strangers to the blood But the further contention is that the unconstitutionality of the act in this respect is so material to the effect of the act as a whole, that it is not to be presumed that the legislature would have enacted the entire act if they had understood that this part of it was unconstitutional, and therefore, that the rule applies which declares that where a part of an act which is unconstitutional is so intermingled with the act as a whole, and so important to its effect, as to give rise to the presumption that the legislature
12 would not have enacted the remainder of it without the unconstitutional part, the whole act must be declared unconstitutional. This contention of the appellants is based upon the proposition that the designation in the title, to wit: "Collateral inheritances, bequests, and devises," must be so read that the word "collateral" shall be applied as a qualifying adjective to the words "bequests" and "devises," and consequently it is argued that the act does not include bequests and devises to strangers to the blood, but only bequests and devises to collateral kindred. The word "collateral," however, has not necessarily the narrow meaning here contended for, or at any rate we should not give it that meaning, if the effect of such construction is to make the law unconstitutional. Here, again, we must apply the rule that where a law is reasonably susceptible of a construction which will make it constitutional, we must adopt that construction rather than one which will make it unconstitutional, although the latter may be more reasonable or obvious than the former. Collateral means on the side, or at one side, of a subject, and in this sense a bequest to any person not in the direct line of relationship would be properly termed a collateral bequest, although the person was not akin to the testator. Giving

the title of the act this construction, it does include bequests and devises to strangers, as well as those to the testator's own kindred, and is not unconstitutional as to either. It is, however, questionable whether the word "collateral" should not be limited in its application to the word "inheritances," and not extended to the words "bequests" and "devises," in which case the objection is baseless.

Another objection is that there is a provision in the act imposing taxes upon property transferred by deed, grant, sale, or gift, made to take effect in possession or enjoyment after the death of the decedent, and that this class of dispositions of property is not ex-
13 pressed in the title of the act, and upon this theory it is again claimed that the whole act must be declared unconstitutional. It is sufficient to say upon this point, that even if the law is unconstitutional with respect to property disposed of in this manner, it is quite apparent that it is not so important to the effect of the act or section as a whole as to make the entire section unconstitutional.

The portion of the decree appealed from is affirmed.

SHAW, J.

We concur:

VAN DYKE, J.
HENSHAW, J.
LORIGAN, J.

Concurring Opinion.

I concur. As to the word "collateral" in the title of the act, I have no doubt that it was intended to qualify inheritances alone. There is no such thing as a collateral devise or bequest.

BEATTY, C. J.

Supreme Court, State of California.

Banc Minutes.

NOVEMBER 27, 1903.

Estate of CAMPBELL.

The portion of the decree appealed from is affirmed.

SHAW, J.

We concur:

VAN DYKE.
HENSHAW.
LORIGAN.

Concurring opinion by Beatty, C. J.

Supreme Court, State of California.

Banc Minutes.

DECEMBER 22, 1903.

Estate of CAMPBELL.

By the COURT: The judgment of the court heretofore entered herein is vacated, and the cause ordered placed on the next bank calendar for argument, and the clerk will notify attorneys hereof.

HENSHAW, J.
ANGELOTTI, J.
McFARLAND, J.
LORIGAN, J.

14 San Francisco. No. 3293. In Bank. June 18th, 1904.

In the Matter of the Estate of CORNELIA E. CAMPBELL, Deceased; George O. Campbell *et al.*, Appellants.

By the COURT: "After further consideration of this case we are satisfied with the decision hereinbefore made in bank, and with the opinion hereinbefore delivered by Mr. Justice Shaw, which is on file herein and is published in volume XXVI of California Decisions, commencing at page 808; and that for the reasons given in that opinion the decree of distribution appealed from should be affirmed. It may be well to say, however, that it is not stated in that opinion that there are two different or inconsistent rules in the cases of the City of Pasadena *v.* Stimson, 91 Cal. 249, and Darcy *v.* Mayor, 104 Cal. 624—as intimated in one of the petitions for rehearing. In the Pasadena case, while it was held that the statutory provision there in question was unconstitutional, the general rule was stated to be that a law "is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction." This clause was quoted in the opinion of Mr. Justice Shaw, and the expression in the latter opinion that "We are of the opinion that this case comes within the first rule, and not within the qualification last stated," clearly means only that the case at bar comes within the general rule stated in City of Pasadena *v.* Stimson and is not within the principle of the exceptions which are held, both in the Pasadena case and in Darcy *v.* Mayor, to be unconstitutional. It may be further
15 said, in response to the contention that the law in question is violative of the fourteenth amendment to the Federal Constitution, that if, as we hold, it is not forbidden by the constitution of this State, it is, for like reasons not violative of the Federal Constitution. Federal courts have held that provisions of State statutes which make unwarranted distinctions and discriminations contra-

vene the principle of equality declared in the fourteenth amendment; but in Magoun *v.* Ill. T. & S. Bank, 170 U. S. 283, and Gulf &c. *v.* Ellis 165 U. S. 150—cited by counsel—the rule as to what is, and what is not, unwarranted classification, is substantially the same as that heretofore declared by this court.

The part of the decree of distribution appealed from is affirmed."

Banc Minutes.

JUNE 18, 1904.

By the COURT: The part of the decree of distribution appealed from is affirmed.

16 In the Supreme Court of the State of California.

In the Matter of the Estate of CORNELIA E. CAMPBELL, Deceased; George O. Campbell, Benjamin F. Campbell, Alonzo E. Campbell, and Corlista E. Jess, Appellants.

Assignment of Errors.

George O. Campbell, Benjamin F. Campbell, Alonzo E. Campbell and Corlista E. Jess, having petitioned the above named court for an order permitting them to prosecute a writ of error to the honorable, the Supreme Court of the United States, from the final judgment made and entered in said cause by the supreme court of the State of California, now make and file with their said petition the following, and specify the same as their assignment of errors herein, upon which they will rely for a reversal of said judgment upon said writ:

1.

The court erred in that portion of the decree of distribution entered in the matter of the estate of Cornelia E. Campbell, deceased, wherein it is ordered, adjudged, and decreed "that $488.70 is chargable against the heirs of said deceased as a collateral inheritance tax" for the reason that the statute of the State of California imposing such tax upon brothers and sisters of a decedent is in contravention of the fourteenth amendment to the Constitution of the United States of America in that the classification of brothers and sisters and sons-in-law, daughters-in-law, and widows of sons,
17 whereby brothers and sisters are taxed and the latter exempted, is arbitrary and unreasonable, and denies to the plaintiffs in error the equal protection of the laws. The ruling and decision of the superior court upon said matter, and the affirmance of such portion of said decree as imposes an inheritance tax upon the heirs of said Cornelia E. Campbell by the supreme court of the State of California, are designated as an assignment of error upon which plaintiffs in error will rely for a reversal of the decision and decree herein.

Wherefore, by reason of the foregoing assignment of errors and the petition of plaintiffs in error herein, for leave to prosecute a writ of error herein to the Supreme Court of the United States, the plaintiffs in error submit their said petition and this assignment of error and pray for an order of this honorable court; and said plaintiffs in error further pray that upon the hearing of this cause by the said Supreme Court of the United States upon such writ of error, that portion of the decree rendered herein by the superior court of the city and county of San Francisco, imposing an inheritance tax upon the heirs of said Cornelia E. Campbell, and the judgment of the supreme court of the State of California affirming the same may be by said Supreme Court of the United States reversed and set aside, and that upon said hearing of such writ of error such other and further order may be made in the premises as may be just.

C. H. GAROUTTE,
W. N. GOODWIN,
Attorneys for Plaintiffs in Error.

Filed Jul- 23, 1904.

FRANK C. JORDAN, Clerk,
By I. ERB, Deputy.

18 In the Supreme Court of the State of California.

In the Matter of the Estate of CORNELIA E. CAMPBELL, Deceased.

To the honorable chief justice of the supreme court of the State of California:

George O. Campbell, Benjamin F. Campbell, Corlista E. Jess, and Alonzo E. Campbell, plaintiffs in error herein, most respectfully represent to your honor, that Cornelia E. Campbell died intestate in the city and county of San Francisco, State of California, on the 15th day of December, 1900, and that she was a resident of said city and county at the time of her said death, and left an estate of both real and personal property in said State of California; that at the time of her death said decedent was an unmarried woman and left surviving her no husband, ancestor, or issue; that her next of kin are, and at the time of her death were, George O. Campbell, Benjamin F. Campbell, and Alonzo E. Campbell, her brothers, and Corlista E. Jess, her sister, and that said decedent left surviving her no other brother or sister and no child or descendant of a deceased brother or sister, and that said next of kin are all residents of the State of California.

That by an order of the superior court in and for the city and county of San Francisco, duly given and made, Benjamin F. Campbell, George O. Campbell, and Corlista E. Jess were appointed administrators and administratrix of said estate; and that they duly qualified as such, and on the 31st day of December, 1900, letters of

administration of said estate were issued to them, and they have ever since acted as such administrators and administratrix.

19 That said estate was duly inventoried and appraised in the manner provided by law, by appraisers appointed by said superior court. That on or about the 3rd day of January, 1901, this court duly gave and made an order directing that notice to the creditors of said decedent to present their claims be published by said administrators and administratrix once a week for four weeks; that said publication was commenced on or about January 5th, 1901, and was made as directed as aforesaid, and required said creditors to present their claims to said administrators and administratrix at a place in the city and county of San Francisco, State of California, therein designated, within ten months after the first publication of said notice.

That on the 21st day of November, 1900, said estate was in condition to be closed, and the property distributed to the parties entitled thereto, and on that day your petitioners filed in the said superior court in and for the city and county of San Francisco, their petition for the distribution to them of the estate of said Cornelia E. Campbell, and at the same time filed therewith their final account as administrators and administratrix of said estate showing property on hand and to be distributed after payment of all debts and expenses of administration, of the value of $9,774.00.

That said petition for distribution came regularly on for hearing on the 2nd day of December, 1901, and on said day said superior court in and for the city and county of San Francisco, acting by and through the Honorable J. V. Coffey, judge presiding in department 9 of said court, made and caused to be entered in the matter of said estate of Cornelia E. Campbell, deceased, its decree distributing to your petitioners, equally all of the property remaining of said estate, and ordering, adjudging and decreeing that they pay an inheritance tax thereon to the State of California of the sum of $488.70.

20 That said decree was regularly entered at large in the probate minutes of said court on the 2nd day of April, 1902, and on the 22nd day of April, 1902, your petitioners appealed to the supreme court of the State of California from that portion of the decree of distribution which directs the payment of a collateral inheritance tax, and perfected the same by filing the statutory undertaking on appeal in the sum of three hundred dollars.

That your petitioners in due time prepared and filed in the supreme court of the State of California their transcript on appeal from said order, consisting of, and containing only the said decree of distribution, the said notice of appeal with proof of service, and the following stipulation :

In the Superior Court of the City and County of San Francisco, State of California.

In the Matter of the Estate of CORNELIA E. CAMPBELL, Deceased

It is hereby stipulated that the foregoing decree of distribution and notice of appeal may constitute the record on appeal herein, and that all matters relating to the correctness of the order of the superior court directing the payment of a collateral inheritance tax, which is to be the only question raised on said appeal, are sufficiently presented by such record and the following stipulation.

It is further stipulated that the amount of property distributed to each of the distributees named in said decree of distribution exceeded the sum of one thousand dollars ($1000) the amount necessary for the expense of closing said estate.

And it is further ordered, adjudged, and decreed that said administrators and administratrix do deliver over and distribute to said George O. Campbell, Benjamin F. Campbell, Alonzo E. Campbell, and Corlista E. Jess, each, an undivided one-fourth (¼) of all other property of said estate.

Done in open court this 2nd day of December, 1901.

J. V. COFFEY, Judge.

Endorsed: Filed, Dec. 2nd, 1901. Wm. A. Dean, clerk. By Carl W. Mueller, deputy.

21 That on the 27th day of November, 1903, the said supreme court of the State of California affirmed that portion of the decree appealed from; that your petitioners petitioned for a rehearing of said matter, and on the 22nd day of December, 1903, the said court granted the same, and on the 18th day of June, 1904, made and caused to be filed its judgment again affirming the portion of the said decree appealed from. That opinion of said court is as follows:

San Francisco. No. 3293. In Bank. June 18, 1904.

In the Matter of the Estate of CORNELIA E. CAMPBELL, Deceased; George O. Campbell *et al.*, Appellants.

By the COURT:

"After further consideration of this case we are satisfied with the decision hereinbefore made in bank, and with the opinion hereinbefore delivered by Mr. Justice Shaw, which is on file herein and is published in volume XXVI of California Decisions, commencing at page 808; and that for the reasons given in that opinion the decree of distribution appealed from should be affirmed. It may be well to say, however, that it is not stated in that opinion that there are two different or inconsistent rules in the cases of The City of Pasadena *v.* Stimson, 91 Cal. 249, and Darcy *v.* Mayor, 104 Cal. 642—as

intimated in one of the petitions for rehearing. In the Pasadena case, while it was held that the statutory provision there in question was unconstitutional, the general rule was stated to be that a law 'is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction.' This clause was quoted in the opinion of Mr. Justice Shaw, and the expression in the latter opinion that 'we are of the opinion that this case comes within the first rule, and not within the qualification last stated,' clearly means only that the case at bar comes within the general rule stated in City of Pasadena *v.* Stimson and is not within the principle of the exceptions which are held, both in the Pasadena case and in Darcy *vs.* Mayor, to be unconstitutional. It may be further said, in response to the contention that the law in question is violative of the fourteenth amendment to the Federal Constitution, that if, as we hold, it is not forbidden by the constitution of this State, it is, for like reasons, not violative of the Federal Constitution. Federal courts have held that provisions of State statutes which make unwarranted distinctions and discriminations contravene the principle of equality declared in the fourteenth amendment; but in Magoun *v.* Ill. T. & S. Bank, 170 U. S. 283, and Gulf, etc. *v.* Ellis, 165 U. S. 150—cited by counsel—the rule as to what is, and what is not, unwarranted
22 classification, is substantially the same as that heretofore declared by this court.

The part of the decree of distribution appealed from is affirmed."

That your petitioners specially set up and claimed at the hearing of said matter in the superior court, and upon the appeal to this court, immunity from the payment of said inheritance tax, because the classification in the law enacted by the legislature imposing said inheritance tax is violative of the fourteenth amendment to the Constitution of the United States in that the same is arbitrary as to brothers and sisters, they being taxed, while sons-in-law, daughters-in-law and the widows of sons who are no better entitled, are exempted from the payment of the tax, thereby denying to brothers and sisters the equal protection of the law.

That the decision and judgment of the said superior court of the city and county of San Francisco, State of California, and as well the decision and judgment of the supreme court of the State of California, upon said appeal in said cause, were each and both against the said right, privilege and immunity so existing and specially set up and claimed by your petitioners under the Constitution of the United States, plaintiffs in error herein, being dissatisfied with the decree made and entered in said matter so far as the same imposed the payment of an inheritance tax upon your petitioners, and with the affirmance of that portion of said decree by said honorable supreme court, and feeling themselves aggrieved thereby, and plaintiffs in error claiming that the estate of said Cornelia E. Campbell, deceased, should have been distributed to them free of any inheritance tax

whatever, and that the decree so entered is contrary to law so far as it imposes such tax. For the proof of all of which statements herein made, and for further particulars as to the questions and matters involved in said cause, reference is hereby made to the record of said cause on file in the office of the clerk of the supreme court of the State of California.

23 Come now aforesaid George O. Campbell, Benjamin F. Campbell, Alonzo E. Campbell and Corlista E. Jess, plaintiffs in error, by their attorneys, C. H. Garoutte and W. N. Goodwin, and petition this honorable court for an order allowing said plaintiffs in error to prosecute a writ of error herein to the honorable Supreme Court of the United States, under and in accordance with the laws of the United States in that behalf made and provided.

And also that an order be made fixing the amount of security which the plaintiffs in error herein shall give upon said writ, as required by the laws of the United States, and by the rules of the Supreme Court of the United States.

And your petitioners, as in duty bound, will ever pray, &c.

C. H. GAROUTTE,
W. N. GOODWIN,
Attorneys for Plaintiffs in Error.

Filed July 23, 1904.

FRANK C. JORDAN, Clerk,
By I. ERB, Deputy Clerk.

In the Supreme Court of the State of California.

In the Matter of the Estate of CORNELIA E. CAMPBELL, Deceased.

Order Allowing Writ of Error.

Upon the petition of George O. Campbell, Benjamin F. Campbell, Corlista E. Jess, and Alonzo E. Campbell, plaintiffs in error, for a writ of error herein and the accompanying assignment of error presented and filed therewith on this — of —— 1904, on motion of C. H. Garoutte and W. N. Goodwin of counsel for plaintiffs in error,—

It is ordered that a writ of error herein be, and is hereby allowed, and that plaintiffs in error give a bond for costs and just damages for delay herein, as required by law and the rules of the Su-

24 preme Court of the United States in the penal sum of five hundred dollars.

July 22nd, A. D. 1904.

W. H. BEATTY,
Chief Justice of the Supreme Court
of the State of California.

Filed July 23, 1904.

FRANK C. JORDAN, Clerk,
By I. ERB, Deputy Clerk.

In the Supreme Court of the State of California.

In the Matter of the Estate of CORNELIA E. CAMPBELL, Deceased.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the State of California, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, in the District of Columbia, on the 16 day of September A. D. 1904, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein George O. Campbell, Benjamin F. Campbell, Alonzo E. Campbell and Corlista E. Jess, are plaintiffs in error, to show cause, if any there be, why the decree rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. H. Beatty, chief justice of the supreme court of the State of California, this 22 day of July A. D., 1904.

W. H. BEATTY,
Chief Justice of the Supreme Court
of the State of California.

Filed July 23, 1904.

FRANK C. JORDAN, Clerk,
By I. ERB, Deputy Clerk.

25 The Ætna Indemnity Company, Hartford, Conn.

In the Superior Court of the State of California.

In the Matter of the Estate of CORNELIA E. CAMPBELL, Deceased; George O. Campbell, Benjamin F. Campbell, Alonzo E. Campbell, and Corlista E. Jess, Plaintiffs in Error.

Know all men by these presents, that the Ætna Indemnity Company, a corporation organized under the laws of the State of Connecticut, is held and firmly bound unto The People of the State of California in the sum of five hundred dollars lawful coin of the United States, for the payment of which sum, well and truly to be made, the Ætna Indemnity Company binds itself firmly by these presents.

Sealed and dated this 23rd day of July, A. D., 1904.

Whereas, on the 2nd day of December, A. D., 1901, the superior court of the city and county of San Francisco, State of California, made and entered a decree of distribution in the matt- of the aforesaid estate, whereby in said decree of distribution it is ordered, adjudged, and decreed that the heirs of said Cornelia Campbell, deceased, to-

wit: Benjamin F. Campbell, George O. Campbell, Alonzo E. Campbell and Corlista E. Jess, pay a collateral inheritance tax amounting to $488.70 upon the estate of the aforesaid deceased coming
26 to them under said decree of distribution; and

Whereas the plaintiffs in error duly perfected an appeal to the supreme court of the State of California from the aforesaid decree of distribution; and whereas by such appeal the validity of the aforesaid decree of distribution was, by the aforesaid supreme court of the State of California in all respects affirmed;

And whereas, the petition of plaintiffs in error, was, on the 22nd day of July, 1904, duly presented to the chief justice of the supreme court of the State of California, praying for an allowance of a writ of error to the supreme court of the State of California, and an order at the time of such allowance was made that plaintiffs in error give a bond for costs and just damages in delay herein, as required by law and the rules of the Supreme Court of the United States, in the penal sum of $500.00:

Now, the condition of this obligation is such that if the said plaintiffs in error shall prosecute said writ of error to effect and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise it shall remain in full force and effect.

THE ÆTNA INDEMNITY COMPANY
OF HARTFORD CONNECTICUT,
By JASON BRIESEE, Attorney-in-fact.

Attest:
[SEAL.] A. M. HOWELL, Assistant Secretary.

Filed Jul- 23 1904.

FRANK C. JORDAN, Clerk,
By I. ERB, Deputy.

27 In the Supreme Court of the State of California.

In the Matter of the Estate of CORNELIA E. CAMPBELL, Deceased.

I, Frank *E.* Jordan, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of writ of error, transcript on appeal, opinions and judgment, assignment of error, petition for writ, order allowing writ, citation and bond, as shown by the records of my office, and that the same constitutes the writ of error in this case.

Witness my hand and the seal of the court, this 23 day of July A. D., 1904.

[Seal Supreme Court of California.]

FRANK C. JORDAN, Clerk,
By I. ERB, Deputy.

28 UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the honorable the justices of the supreme court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in said supreme court of the State of California, before you, or some of you, being the highest court of law or of equity of said State in which a decision could be had in that certain proceeding in the matter of the estate of Cornelia E. Campbell, numbered in your records as San Francisco number, 3293, wherein was drawn in question the validity of a statute or of an authority exercised under said State on the ground of its being repugnant to the Constitution or laws of the United States, and the decision was in favor of such validity, or wherein was drawn in question the construction of a clause of the Constitution, or of a statute of or commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said Constitution, statute or commission, a manifest error has happened, to the great damage of the plaintiffs in error, George O. Campbell, Benjamin F. Campbell, Corlista E. Jess, and Alonzo E. Campbell, heirs at law of said Cornelia E. Campbell, deceased, as by the record appears, we being willing that error, if any has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 16th day of September, 1904, in the said
29 Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States the 19 day of July, in the year of our Lord, one thousand nine hundred and four.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

SOUTHARD HOFFMAN,
Clerk of the Circuit Court of the United States in and for the Ninth Judicial Circuit and Northern District of California.

Allowed this 22 day of July, A. D. 1904.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

I hereby certify that a copy of the foregoing writ of error was on the 23rd day of July, 1904, lodged in the clerk's office of the said supreme court of the State of California for the said defendant in error.

[Seal Supreme Court of California.]

FRANK C. JORDAN,
Clerk of the Supreme Court of the State of California,
By I. ERB, Deputy.

30 [Endorsed:] Original. No. 3293. In the supreme court of the State of California. In the matter of the estate of Cornelia E. Campbell, deceased. Writ of error. Filed Jul- 23 1904 Frank C. Jordan, clerk by I. Erb deputy.

Service accepted this 23rd day of July, 1904.

L. F. BYINGTON,
District Attorney.
I. HARRIS,
Ass't Dist. Att'y.
U. S. WEBB,
Attorney General of California.
S.

31 In the Supreme Court of the State of California.

In the Matter of the Estate of CORNELIA E. CAMPBELL, Deceased.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the State of California, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, in the District of Columbia, on the 16th day of September A. D. 1904, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein George O. Campbell, Benjamin F. Campbell, Alonzo E. Campbell and Corlista E. Jess, are plaintiffs in error, to show cause, if any there be, why the decree rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. H. Beatty, chief justice of the supreme court of the State of California, this 22 day of July A. D., 1904.

W. H. BEATTY,
Chief Justice of the Supreme Court
of the State of California.

32 [Endorsed:] No. 3293. In the supreme court of the State of California. In the matter of the estate of Cornelia E. Camp-

bell, deceased. Citation. Filed Jul- 23, 1904. Frank C. Jordan, clerk, by I. Erb, deputy. Garoutte & Goodwin, attorneys for pl'ffs in error, Mutual Savings Bank building, 708 Market street, San Francisco. Telephone Bush 762.

Service accepted this 23rd day of July, 1904.

L. F. BYINGTON,
District Attorney.
I. HARRIS,
Ass't Dist. Att'y.
U. S. WEBB,
Att'y Gen'l of California.
S.

Endorsed on cover: File No. 19,430. California supreme court. Term No. 70. George O. Campbell, Benjamin F. Campbell, Corlista E. Jess, and Alonzo E. Campbell, heirs at law of Cornelia E. Campbell, deceased, plaintiffs in error, *vs.* The State of California. Filed July 29th, 1904. File No. 19,430.

In the Supreme Court of the United States

Office Supreme Court U. S.
FILED
SEP 14 1905
JAMES H. McKENNEY,
Clerk

OCTOBER TERM, 1905.

No. 70.

GEORGE O. CAMPBELL, BENJAMIN F. CAMPBELL, CORLETTA E. JESS, and ALONZO E. CAMPBELL, Heirs-at-law of Cornelia E. Campbell, Deceased, Plaintiffs in Error,

v.

THE STATE OF CALIFORNIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

CHARLES H. GAROUTTE,
WILLIAM N. GOODWIN,
Attorneys for Plaintiffs in Error.

CURTIS H. LINDLEY,
Of Counsel.

Filed this.....day of.....A. D. 1905.

Peyton Press, S. F.

INDEX TO CONTENTS

Page

History of the Case..... 1

The Magoun and Billings Cases..... 4

Inheritance Tax Acts, Their Theory and Purpose..... 6

The Act Involved Does not Regulate the Succession and Devolution of Estates..... 7

Why May Classification of Persons be Made in Inheritance Tax Legislation 10

The Constitutional Rule of Classification..... 16

Classification Must be Based Upon Some Reasonable Ground.... 18

This Court Always Applies the Rule of Reasonable Ground.... 19

Missouri, Kansas & Texas Ry. Co. v. May, 194 U. S. 267..... 22

There is no Reasonable Ground—no Fair Reason..... 24

Tested by the Rule Declared in the Magoun Case, the Act is Unconstitutional 26

We Invoke the Legislation of This Country as Stare Decisis.... 28

Presumptions to Support the Validity of Legislative Action.... 31

The Fourteenth Amendment..... 33

The California Act, the Congressional Act, and the Washington Act 35

Limits of the Power of Taxation..... 38

Inheritance Laws Must not Discriminate Between Persons..... 41

The Decision of the Supreme Court of the State of California.. 42

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 70.

GEORGE O. CAMPBELL, BENJAMIN F. CAMPBELL, CORLISTA E. JESS, and ALONZO E. CAMPBELL, Heirs-at-law of Cornelia E. Campbell, Deceased, Plaintiffs in Error,

v.

THE STATE OF CALIFORNIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

HISTORY OF THE CASE.

The brothers and sisters of Cornelia E. Campbell, deceased, are prosecuting this appeal by writ of error from a judgment of the Supreme Court of the State of California, affirming an order of the Superior Court, which required them to pay a collateral inheritance tax

of five per cent upon each one hundred dollars of the estate coming to them from their deceased sister.

In the year 1893, the Legislature of the State of California passed a Collateral Inheritance Tax Act. This Act in all respects was a duplicate of the Collateral Inheritance Tax Act of the State of New York, passed in 1887; and following the New York Act, the California Act created a class of persons consisting of father, mother, husband, wife, children, brother, sister, wife or widow of a son, and husband of a daughter, and exempted them from the payment of any tax and taxed all other persons. In the year 1899, the State Legislature made a single amendment to this Act, by which amendment brothers and sisters alone, were taken from the class exempted and placed in the class taxed. There never has been but two classes under the California Act; namely, those required to pay a tax of five per cent upon each one hundred dollars of their share of the estate, and those not taxed.

The California Act, after the amendment of 1899, and which amended act we here assail, is entitled:

> "An Act to amend an act entitled 'An act to establish a tax on collateral inheritances, bequests, and devises, to provide for its collection, and to direct the disposition of its proceeds,' approved March 9, 1897."

The material part of this Act reads as follows:

> "Section 1. All property which shall pass, by will or by the intestate laws of this state, from any person who may die seized or possessed of the

> same while a resident of this state, or if such decedent was not a resident of this state at the time of death, which property, or any part thereof, shall be within this state, or any interest therein or income therefrom, which shall be transferred by deed, grant, sale or gift, made in contemplation of the death of the grantor or bargainor, or intended to take effect in possession or enjoyment after such death, to any person or persons, or to any body politic or corporate, in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled, in possession or expectancy, to any property, or to the income thereof, other than to or for the use of his or her father, mother, husband, wife, lawful issue, the wife or widow of a son, or the husband of a daughter, * * * shall be and is subject to a tax of five dollars on every hundred dollars of the market value of such property, and at a proportionate rate for any less amount, to be paid to the treasurer of the proper county, as hereinafter defined, for the use of the State." (Cal. Statutes 1899, page 101.)

It thus will be observed that brothers and sisters are taxed five per cent upon each one hundred dollars of the respective estates passing to them, while the wife or widow of a son, or husband of a daughter is not taxed at all.

Our assignment is "That the Court erred in holding 'that $488.70 is chargeable against the heirs of "said deceased as a collateral inheritance tax' for "the reason that the statute of the State of California "imposing such a tax upon brothers and sisters of a "decedent is in contravention of the Fourteenth "Amendment to the Constitution of the United States

"of America, in that the classification of brothers and "sisters, and sons-in-law, daughters-in-law, and widows "of sons, whereby brothers and sisters are taxed and "the latter exempted, is arbitrary and unreasonable, "and denies to the plaintiffs in error the equal pro- "tection of the laws." And we now make the point, and come before this Court upon the contention that such a classification amounts to an arbitrary discrimination in favor of these relatives by marriage as against the brothers and sisters of the deceased; and therefore the act denies to brothers and sisters the equal protection of the law, guaranteed by the Fourteenth Amendment of the Federal Constitution. It needs no argument to convince the Court that children could not be taxed five per cent upon each one hundred dollars of the estate of their father coming to them, and these relatives by marriage not taxed upon their share of his estate. And we say that upon principle this case stands in no different position. But let the Court bear in mind, we are not here insisting that these relatives by marriage may not be placed in a class and exempted from the tax; *our claim is, that they may not be exempted and brothers and sisters taxed.*

THE MAGOUN AND BILLINGS CASES.

There are only two cases decided by this Court where the question of classification under collateral inheritance tax laws has been fully discussed—the Magoun case and the Billings case. In the Magoun case, 170 U. S.

283, the question of classification involved the power of the legislature to classify persons according to the value of the estate coming to the party required to pay the tax. *There the classification of persons per se was conceded to be proper.* In that case, the Illinois act was involved, which placed in one class direct kindred and required them to pay a tax of one per cent upon each one hundred dollars of the estate coming to them in excess of twenty thousand dollars. Certainly the legislature could have exempted direct kindred from the payment of any tax whatever, and therefore we can conceive of no reason why that body did not have the power to fix the exemption at twenty thousand dollars.

In *Billings v. Illinois,* 188 U. S. 97, the act involved, taxed life estates when the remainders passed to lineal kindred, and exempted life estates when the remainders passed to collaterals and strangers to the blood. By the decision rendered in that case, this Court held the act constitutional, and we see no other conclusion to be arrived at. The case in principle is identical with the Magoun case wherein exemptions were made of estates less than twenty thousand dollars in value going to direct kindred. The legislature had the power to exempt all life estates from any tax whatever, and therefore, necessarily had the power to tax only one class of life estates. Surely a collateral inheritance tax law would not be unconstitutional so far as discriminating classification is concerned, which taxed freehold estates and exempted life estates, or taxed personal property and exempted real property. There

could be no question of unconstitutional classification in such laws, for under those classifications all persons would be treated alike. It thus appears that in the Billings case, and in the Magoun case, the classifications were based upon property; in the Magoun case, upon the amount of property, and in the Billings case, upon the character of property. *But in the case at bar, the classification is based upon persons inter sese. This case presents no question of classification of persons based upon property, and in principle there is a world of difference between the two. For when a classification of persons inter sese is made, then all persons standing alike in the eyes of the law must be placed in the same class; and if some are omitted and thereby discriminated against, they are denied the equal protection of the law.*

INHERITANCE TAX ACTS, THEIR THEORY AND PURPOSE.

We are here viewing this act from the standpoint of the State, and from that standpoint, we affirm it to be a revenue measure. It has not the slightest earmarks of a regulating or police measure; and there is nothing in the subject matter with which it deals that bears the slightest relation to that kind of legislation. It is a tax in the nature of a license, duty, or excise, levied upon the right or privilege granted to persons by the State, of taking property by inheritance, bequest and devise. We affirm it to be a tax act for revenue, pure and simple. During the war of the Rebellion, this character of legislation was resorted to as a temporary and urgent measure for the purpose of raising money to assist in the

support of the government; and Congress again passed a similar act at the inception of our late Spanish War. Indeed, the theory and purpose of acts of this character are well put by Dos Passos in his work entitled "Inheritance Tax Laws" at page 5, in the following language:

> "The theory of the promoters of direct inheritance and collateral tax legislation is based upon both logical and legal ground, i. e., that what is generally understood as the right to take by will or from intestates is, after all, but a mere privilege of a municipal law, to be changed, modified, or repealed in the discretion of the State, and not a natural right, and that it is only just and proper, in consideration of this privilege, that property passing by will to lineals and collaterals, remote relatives, strangers to the blood, and corporations, or through intestate laws, to collaterals and relatives having for the most part no particular claim whatever upon the decedent, should pay to the State conferring this valuable privilege, a fair and reasonable bonus or percentage upon the value of the property thus transmitted and received. Hence, these laws have been adjudged by the best authorities to impose, not a mere property tax, as claimed by some, but simply a tax duty, or excise, upon the devolution or succession of property under inheritance and intestate laws."

THE ACT INVOLVED DOES NOT REGULATE THE SUCCESSION AND DEVOLUTION OF ESTATES.

This act does not purport to regulate the succession of estates. It in no sense can be said to be an act regulating the succession and devolution of estates of deceased persons; the title of the act under the Con-

stitution of California would not support that construction. Again, repeals by implication are not favored, and if this act were held in any degree to be a succession act, then, *pro tanto*, it would repeal the laws of succession, which have stood unchanged and unquestioned in California for more than fifty years. The rights of brothers and sisters, and all other persons as to the devolution of the property of a deceased person had been fixed, as we have said, for fifty years, when the present act was passed; and it was with those rights so fixed and well understood that the legislature dealt, when this tax was laid.

The Appellate Court of Pennsylvania, in discussing this question, said:

> "The Act in question has none of the features of an intestate law, or of an act regulating the disposition of property by will or by instruments in the nature thereof. On the contrary, upon its face and in all its provisions it is manifestly a tax law, clearly and distinctly predicated of the actual existence and general operation of an intestate law and a will's act, under the operation of one or other of which the personal property intended by its provisions to be subjected to taxation, would pass from the then as well as subsequent owners thereof, to others, or has heretofore passed and become vested in others prior to the date of the act under consideration. * * *
>
> "Without pausing to consider the soundness as well as the scope of the principle thus broadly asserted, but conceding, for argument's sake merely, that the legislature has the power under our Constitution to so change the law of descent and succession as to give the commonwealth a certain portion of every decedent's estate, or to otherwise regulate the transmission or devolution of such

> estates, it does not by any means follow that the 'direct inheritance tax law' under consideration is such an act. As we have seen, the act does not profess to be a supplement to or an amendment of our laws relating to the estates of testates, or intestates but quite the reverse."
>
> *Estate of Cope*, 191 Pa. St. 1.

And Mr. Justice Brewer, in the Magoun case, 170 U. S. 283-303, repeats this thought in the following language in discussing the power of the State in regulating successions:

> "But whatever may be the power of the legislature, Illinois had regulated the matter of descents and distributions, and had granted the right of testamentary disposition. And now by this statute, upon property passing in accordance with its statutes, a tax is imposed."

In the case of *In Re Magnes' Estate*, Vol. 77, Pac. Rep. 854-857, decided June 20, 1904, the Colorado Court of Appeals, in speaking of the Inheritance Tax Act of that State said:

> "It is difficult to see wherein the imposition of a succession tax on property passing under the intestate laws, changes the pre-existing law of descent. That law remains just as it was before. Property passes thereunder after, just as it did before the tax was laid, and to precisely the same persons; and the laying of the tax merely casts upon its devolution to those persons a burden that was not borne before, but which at any time the State could impose in the form of a tax."

It is said in *State ex rel Schwartz v. Ferris*, 53 Ohio St. 1:

"Again, it is claimed in favor of the law that this statute is not purely for the raising of revenue, but for the regulation of the succession and transfer of property, and that the state has a right to say that it will regulate the matter of succession to great estates by making a greater charge for the privilege, and thus discourage the holding together of great estates until death. The answer is that the matter of succession and transfer of property is already fully regulated by our statutes as to wills, descent, distribution, and conveyance; and if further regulation is desired purely as regulation, aside from revenue, it would most likely be sought in the amendment of those statutes. The act is clearly one for taxation, and not for regulation, as shown by its provisions and title."

WHY MAY CLASSIFICATION OF PERSONS BE MADE IN INHERITANCE TAX LEGISLATION.

If all persons stood exactly alike viewed with the eyes of inheritance tax legislation, there could be no classification of persons for tax purposes; for all standing alike before the law, any discrimination would be arbitrary, and therefore violative of the fourteenth amendment; yet it is conceded by all legislatures and all courts that in this character of legislation, the people may be divided into classes, and these different classes taxed at different rates. In the Billings case, 188 U. S. 97-102, this Court, speaking of the rule governing classifications of persons, said:

"Human beings are essentially alike, yet some individuals may have attributes or relations not possessed by others, which may constitute a class. But their classification—indeed all classification—must primarily depend upon purpose—the problem presented."

And the problem here presented, is, what intrinsic differences in persons will constitutionally justify different classifications of those persons for inheritance tax purposes?

Now what is the basis of classification? What is the principle justifying it—the bedrock upon which it rests? We answer, it is blood relationship. It is the relative blood relationship of the deceased and his kin. Classifications are based upon the natural order of relationship—a natural order of relationship between whose members there exist mutual love, obligation, and duty; and the closer the relationship, the greater the love, the obligation and the duty. This relationship and its reciprocal demands are recognized over the whole world, civilized and uncivilized. It is this element of natural love, obligation and duty, born of this relationship, that has been recognized and acted upon universally by legislatures of this country, as the basis in classifying people for the purpose of laying upon them an inheritance tax. Legislatures have recognized the principle, that the closer the relationship, greater is the equity, greater is the moral claim and greater is the right existing between these people.

As we have seen, Dos Passos declares this to be the true principle of classification, and this same principle is well put in *Minot v. Winthrop,* 162 Mass. 113, as follows:

> "The tax imposed by the statute we are considering is said to be unequal because it is not imposed upon all estates, and upon all heirs, devisees, legatees and distributees. To make a

> distinction between collateral kindred or strangers in the blood, and kindred in the direct line, in reference to an assessment of such a tax either by exempting the kindred in the direct line, or by imposing upon collaterals and strangers a higher rate of taxation, has the sanction of nearly all States that have levied taxes of this kind. It has a sanction in reason, for the moral claim of collaterals and strangers is less than of kindred in the direct line, and the privilege is therefore greater."

The privilege to take, being solely a creation of the municipal law, necessarily that law may place a tax upon the privilege inversely proportioned to the moral claim which each person has upon the deceased and his estate; that is, as the moral claim decreases, the privilege to take increases; and this moral claim existing in favor of the kin of the deceased, against him and his estate, is the basic bedrock principle, upon which classifications should be based in apportioning this tax among the people. It is the presence and recognition of this relationship with its reciprocal demands, that obviates the necessity in the legislature of making one great class of all people. And it is for this reason that all persons do not stand alike before the law, and therefore constitutional discriminations may be made by dividing them into classes.

This principle is well stated in *Black v. State,* 113 Wis. 205, in the following language:

> "It is a trite expression that classification in order to be legal, must be rational; it must be founded upon *real differences* of *situation* or *condition* which bear a *just* and *proper relation* to the *attempted classification*, and *reasonably justify* a *difference of rule.* It is well settled that there

> may justly be classification between lineal descendants, collateral relatives and strangers; each may be made a class and a different rule applied, *because there are real differences* of situation and (real differences) *in the considerations applicable to the various classes.*" (Italics ours.)

This principle of classification is declared and approved in the Magoun case, 170 U. S. 283-296, as follows:

> "There are three main classes in the Illinois statute, the first and second being based, respectively, on lineal and collateral relationship to the testator or intestate, and the third being composed of strangers to his blood and distant relatives. * * *The first two classes, therefore, depend on substantial differences,—differences which may distinguish them from each other and them or either of them from the other class—differences, therefore, which 'bear a just and proper relation to the attempted classification'—the rule expressed in the *Gulf, Colorado & Santa Fe Railway v. Ellis*, 165 U. S. 150."

And in the same case, Mr. Justice Brewer at page 301, says:

> "Classifying inheritors and legatees into the three classes of near relatives, remote relatives and strangers, and imposing a different rate of taxation as to each of these classes, may not be objectionable. The classification is based upon differences which bear a just and proper relation to it, and where classification is rightful, differences in the rate of taxation may be, so far as the Federal Constitution is concerned, permissible."

Of course, this rate of taxation may vary as classifications vary in the degree of relationship; but that

near relatives may be taxed and *remote* relatives and strangers not taxed has never been claimed by any one. Therefore, under the rule here declared by Mr. Justice Brewer, this act cannot stand unless brothers and sisters may be classed as *remote* relatives, and sons-in-law, daughters-in-law and widows of sons as *near* relatives.

We are here contending that the particular classification of persons found in this act, renders the act unconstitutional; but for the purpose of illustration and argument, we plant ourselves beyond this position, and affirm that even though a particular classification of persons may be rightful and proper in the abstract, still the burdens imposed upon these different classes by the act, may be so apportioned as to render the law unconstitutional. As for example: By a taxation law, church property may be made one class, and all other property a second class. In the abstract, these two classes of property made for taxation purposes, are proper; but if a law of this kind should tax the church property, and exempt the other property, it would be unconstitutional. This result follows, for by thus placing the burdens of the tax, the classification becomes arbitrary. In other words, church property can only be made a constitutional class of property in a taxation law, for the reason that owing to its peculiar characteristics, it is entitled to receive more favorable consideration at the hands of the legislature than other property; and when the legislature discriminates against it, and in favor of other property, it undermines and destroys the foundation principle upon which the classification is justified, and legislates directly contrary to the reasons which

made the classification proper. Putting the idea in a different form, it may be said that the moment the legislature places the tax upon church property and exempts other property, that moment the classification becomes arbitrary and therefore unconstitutional. *Or viewing the matter from a different angle, it may be said that in this class of legislation the nature and relative amount of the burdens imposed by the legislature upon the classes created, constitute a vital element going to the question—what is a rightful classification?*

The foregoing principle applies to the law of the case at bar. By a law of this character, children may be placed in a class, and strangers to the blood in a second class. In the abstract this classification of persons is constitutional, but if the law taxed the children and exempted the strangers, it would be unconstitutional. This must be true, for children may only constitute a class for the reason that being nearer to the deceased in relationship than other persons, they are entitled to more favorable consideration at the hands of the legislature than others; and strangers to the blood may only constitute a class for the reason that being farther removed from the deceased than others, they are entitled to less consideration at the hands of the legislature than others. Therefore, to exempt strangers and tax children, would nullify the vital principle upon which classification in this character of legislation is justified, and, as a necessary result, the classification would be entirely arbitrary. It is not merely by reason of the fact that persons stand in different degrees of relationship to the deceased that the creation

of classes for inheritance tax purposes is justified; but behind this, *it is the fact that by reason of these different degrees of relationship, these persons are entitled to different degrees of consideration by the legislature in placing the tax; the degrees of consideration being dependent upon the relative degrees of relationship.* For these reasons children may not be taxed and strangers to the blood exempted; and for these reasons persons of one degree of relationship may not be taxed, and persons of a more remote degree not taxed.

THE CONSTITUTIONAL RULE OF CLASSIFICATION.

Having determined the elements constituting valid classification of persons, we now ask, what is the rule by which the constitutionality of classification is to be tested? The answer to this question is not difficult, for this Court has declared the rule many times. The application of the rule to the facts of some particular case has often proved to be difficult, but as to what the true rule of law is, there is no difficulty. This rule has been well declared by Mr. Justice Brewer, speaking for the Court in *Gulf, Colorado & Santa Fe Railway v. Ellis,* 165 U. S. 150; and the rule as there declared has been expressly approved by this Court in a score of cases since that decision. That rule has been expressly approved in *Magoun v. Illinois T. & S. Bank,* 170 U. S. 283-294—an inheritance tax case—in the following language:

> "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the

reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification."

The learned author of the American State Reports, in a note to *St. Louis etc. Ry. Co. v. Paul*, 62 Am. St. 175, after reviewing practically all of the State and Federal decisions bearing upon this question of constitutional legislative classification, and after a special consideration of the decision of this Court in *Gulf etc. Ry. v. Ellis*, 165 U. S. 155, declares the rule of law in this class of cases in such apt and succinct language, that we cannot refrain from quoting it here:

"Hence, whenever a special charge or duty has been enjoined or penalty imposed by statute upon a special class of persons or corporations from which others are exempt, the inquiry must be, Is there any reason for the classification or discrimination? In many instances there may be a reasonable difference of opinion respecting the answer, or, in other words, the courts may not be able to judicially notice or declare that the classification made is purely arbitrary, and may, therefore, regard the question as a proper one for legislative consideration and determination, and hence may not interpose to declare the legislative discretion has been abused. If, however, the legislature has singled out any class of persons or corporations and imposed upon them restrictions or penalties from which others are exempt, and there is no reason why the former should be subject to the restriction and the latter not, the statute must be pronounced unconstitutional. In re *Eight Hour Law*, 21 Colo. 29; *Braceville Coal Co. v. People*,

147 Ill. 66; 37 Am. St. Rep. 206; *Chicago, etc. Ry. Co. v. Moss*, 60 Miss. 641; *State v. Loomis*, 115 Mo. 307."

CLASSIFICATION MUST BE BASED UPON SOME REASONABLE GROUND.

It is held by all Courts in line with the Magoun case, that classification to be constitutional, must be based upon some reasonable ground; and we now assert that there is no reasonable ground to support the classification which places these relatives by marriage in one class untaxed, and brothers and sisters in another class taxed. For the purposes of this case, it is not necessary even to claim that brothers and sisters are better entitled to exemption from this tax than these relatives by marriage; for our case is made, when we establish that they may not be exempted and brothers and sisters taxed. We say, there is no reasonable ground upon which such a discrimination can be based. This litigation has been long extended and earnest; opposing counsel have filed briefs and made oral arguments, yet, at no time, nor in any Court, have they ever pointed out any reasonable ground upon which this classification may be based. The Supreme Court of the State of California decided this case; yet in the two opinions rendered and found in the record, that Court made no attempt to even suggest any reasonable ground or any ground whatever upon which to base this classification. We have industriously searched everywhere for this "reasonable ground", but have never found

it; and we now assert in all confidence that it does not exist.

Even conceding (for purposes of argument only) that blood relationship is not the sole element constituting the basis of classification of persons, under these acts, still, it is a most important element, and therefore we say it is impossible, tested by every principle upon which classifications can be justified in this character of legislation, that a man's own brothers and sisters—the only persons in all the world whose veins are filled with the same blood which fills his—can be discriminated against in favor of these relatives by marriage—entire strangers to his blood.

THIS COURT ALWAYS APPLIES THE RULE OF REASONABLE GROUND.

This Court has applied the rule of "reasonable ground" to many widely different states of fact; and acts of State Legislatures, scores upon scores, either have been sustained or annulled by the application of it to the Fourteenth Amendment of the Federal Constitution. We cite a few of these cases by way of illustration.

In *Gulf, etc., v. Ellis*, 165 U. S. 150-157, this rule was applied, and it was held that there was no reasonable ground upon which to base the classification there made. The Court saying:

> "But before a distinction can be made between debtors, and one can be punished for a failure to pay his debts, while another is permitted to become in like manner delinquent without any pun-

ishment, there must be some difference in the obligation to pay, some reason why the duty of payment is more imperative in the one instance than in the other.

* * * * * * * * *

"Indeed, the statute singles out one class of debtors, and punishes it for failure to perform certain duties—duties which are equally obligatory upon all debtors, a punishment not visited by reason of the failure to comply with any proper police regulation or for the protection of the laboring classes or to prevent legislation about trifling matters, or in consequence of any special corporate privileges bestowed by the State."

In *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540-563, there was held to be no reasonable ground upon which to base the classification there made, the Court saying:

"Returning to the particular case before us, and repeating or summarizing some thoughts already expressed, it may be observed that if combinations of capital, skill or acts, in respect of any sale or purchase of goods, merchandise, or commodities, whereby such combinations may, for their benefit exclusively, control or establish prices, are hurtful to the public interests and should be suppressed, it is impossible to perceive why like combinations in respect of agricultural products and livestock are not also hurtful."

In *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, there was held to be no reasonable ground upon which to base the classification there made, the Court saying:

"The statute of Kansas in question is in violation of the Fourteenth Amendment of the Con-

> stitution of the United States, in that it applies only to the Kansas City Stock Yards Company and not to other companies or corporations engaged in like business in Kansas, and thereby denies to that company the equal protection of the laws."

In *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 92-95, there was held to be reasonable grounds upon which to base the classification there made, the Court saying:

> "The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle is valid.
>
> * * * * * * * * *
>
> "The discrimination is obviously intended as an encouragement to agriculture, and does not deny to persons and corporations engaged in a general refining business the equal protection of the laws."

In *Atchison, Topeka, etc., Railroad v. Matthews*, 174 U. S. 76-101, there was held to be reasonable grounds upon which to base the classification there made, the Court saying:

> "That there is peculiar danger of fire from the running of railroad trains is obvious. The locomotives, passing, as they do at great rates of speed, and often when the wind is blowing a gale, will, unless the utmost care is taken, (and sometimes in spite of such care) scatter fire along the track. The danger to adjacent property is one which is especially felt in a prairie State like Kansas."

In *Orient Insurance Company v. Daggs*, 172 U. S. 557-562, there was held to be reasonable ground upon

which to base the classification there made, the Court saying:

> "That classification of the Missouri Statute is certainly not arbitrary. We see many differences between fire insurance and other insurance, both to the insurer and the insured—differences in the elements insured against and the possible relation of the parties to them, producing consequences which may justify if not demand different legislative treatment."

It will thus be observed that this court, in passing upon the constitutionality of State legislation in the light of the Fourteenth Amendment, applies the rule of "reasonable ground" to each state of facts as it is presented, and tested by that rule, this statute stands or falls.

MISSOURI, KANSAS & TEXAS RY. CO. V. MAY, 194 U. S. 267.

One of the last as well as one of the most interesting cases in which the question of constitutional classification is considered, when tested by the Fourteenth Amendment, is *Missouri, Kansas & Texas Ry. Co. v. May,* 194 U. S. 267. By the Texas Statute there involved, railway companies were punished by fine, if guilty of allowing Johnson Grass or Russian Thistle to go to seed upon their rights of way. It was claimed by plaintiffs in error that this legislation constituted an arbitrary classification by particularizing railway companies, alone, as subjects for punishment in allowing these noxious weeds to seed upon their lands. The Court in that case upheld the law as a constitutional

classification under the Fourteenth Amendment, and laid down the rule by which the validity of legislative classifications is to be determined; and while this rule leads to the same results and conclusions as the rule found in *Gulf v. Ellis* and in the Magoun case, still its phraseology is so different, and the angle at which the question is approached is so different, that we quote it here; and we quote it for the purpose of firmly planting ourselves upon it, and resting the results of this litigation upon the application of it to the facts of the case at bar.

The Court, in speaking by Mr. Justice Holmes, says:

> "When a State Legislature has declared that in its opinion policy requires a certain measure, its action should not be disturbed by the Courts under the Fourteenth Amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others, whom it leaves untouched."

With all deference, we say this Court can clearly see that there is no fair reason why the California law should tax brothers and sisters, which does not require with equal force its extension to these relatives by marriage, now untouched by the law.

In the same case, Mr. Justice Brown says, in speaking of the presumptive legality of action by a State legislature,

> "Doubtless great weight will be given to its judgment in that regard, and the legislation will not be held invalid, if it be founded upon a real distinction in principle between persons or corporations of the same class."

As will be observed by reading the majority and minority opinions rendered in the Texas case, the entire Court recognizes that some "fair reason" some "real distinction in principle" for the discrimination "real distinction in principle" for the discrimination ma made by a law must be apparent to the mind of the Court, or its validity cannot be upheld. The individual Justices of the Court may differ upon the weight of the particular facts, as to whether or not they constitute a "fair reason" for the discrimination—the basis of the rule approved in the Texas case—or they may differ as to whether or not those particular facts constitute "reasonable grounds for the discrimination"—the basis of the rule found in the Magoun case and in *Gulf v. Ellis,* but as to the rule of law to be applied to any particular state of facts, there is no variance of opinion.

THERE IS NO REASONABLE GROUND—NO FAIR REASON.

In the wide domain of conjecture some one may suggest that the son-in-law is the husband of the daughter, and father of the grand-children of the deceased, that he is the head and support of the family, and therefore, his exemption from the tax is justified as against brothers and sisters; in other words, it may be said that his exemption indirectly benefits these direct descendants of deceased. There are many answers to this suggestion:

(1) This exemption must be deemed and treated as a purely personal exemption to the persons named;

no Court has the right to say by construction that the Legislature, in exempting one person from the payment of a tax, intended thereby not to help that person, but to benefit a third party.

(2) It cannot be presumed that the Legislature intended to give these particular descendants of the deceased a double benefit—one direct and the other indirect, thereby discriminating in favor of married children and grandchildren as against unmarried children. By this construction, married children of the deceased would have two benefits—one direct, and the other indirect. If this be the proper construction of the Act, it is clearly unconstitutional in discriminating in favor of married children and grandchildren, as against unmarried children.

(3) If the Court sustains this law upon the theory that the exemption given to the son-in-law, is, in fact, a benefit intended for and given to his wife and children, then the anomalous results follow that a law would be constitutional which taxed the children and grandchildren of the deceased, and did not tax the son-in-law. For the exemption to the son-in-law being a benefit extended to his wife and children, necessarily it would be constitutional.

(4) Again, if the act in not taxing the son-in-law may be construed as giving a joint benefit to him and his wife and children, then it would still be unconstitutional; for the slightest benefit to the son-in-law is a discrimination against the brother and sister,

as they receive no benefit whatever under the law. Therefore, it can only be upon the theory that the benefit is one intended *exclusively* for the daughter of the deceased and her children, that the law may be supported. With all due deference we say, this construction would reduce the act to an absurdity; for a bequest to the son-in-law freed of the burden of this tax, necessarily results in a substantial personal benefit to him.

As to widows of sons, there is no presumption of law that they are the mothers of children prior to the death of their husbands. Therefore, it conclusively appears that as to them the exemption from the tax was intended by the Legislature to give them an individual personal benefit.

TESTED BY THE RULE DECLARED IN THE MAGOUN CASE, THE ACT IS UNCONSTITUTIONAL.

Bearing in mind that the classification of persons must be based upon blood relationship, we say the relative relationship to the deceased of these people, absolutely forbids the discrimination against brothers and sisters. We venture the assertion that a law taxing children, and exempting grandchildren, or taxing direct kindred and exempting collateral, or taxing collateral, and exempting strangers to the blood, would not stand the constitutional test before this Court. And why? Our answer is, that such a law shocks the moral sense and runs counter to the natural order of relationship; it imposes burdens and confers privileges

in an inverse order to that relationship; and therefore such classification would not be based upon any reasonable ground, but would be arbitrary. And unless sons-in-law and daughters-in-law are to be placed by this Court in the order of relationship nearer to the deceased than his own brothers and sisters, this law fails to meet the true rule.

Are these relatives by marriage closer to the deceased than his brothers and sisters? The negative answer to this question comes from a hundred sources. The history of the world, the drama, literature, art and the Bible demonstrate the truth of our contention. "For whosoever shall do the will of God, the same is my brother and my sister and mother." Mark 3, 35. The experience of daily life answers the question here at issue in the negative; the collateral inheritance tax acts of the states of this Union answer it; for it is no mere coincidence that practically every inheritance tax act in the United States mentions the kindred of the deceased in the order of father, mother, husband, wife, child, brother, sister, followed in some acts directly and in others remotely by wife or widow of a son and husband of a daughter. This unanimity in sequence of terms is not the play of chance, but the recognition of the true order of relationship.

We submit that in the mind and heart of the deceased while living can be found the answer to this question. The affection of his heart, guided by the sense of justice of his mind, at the moment when he seats

himself to make a testamentary disposition of his property, give an answer to this question which cannot be wrong. What this man will do—what mankind in general under these conditions will do, answers the problem we are here seeking to solve, and that answer is this: In but one case of a hundred will this man, by his last will and testament, give his property to these relatives by marriage, as against his brothers and sisters. The probate records of the whole country make good our assertion. We then say this is an answer to our question coming directly from the fountain head—from a source which cannot be mistaken.

WE INVOKE THE LEGISLATION OF THIS COUNTRY AS STARE DECISIS.

Let us look at the legislative history of this country as to collateral inheritance tax laws. In the year 1797, Congress passed a legacy tax act wherein brothers and sisters and these relatives by marriage were classed together. During the war of the rebellion, Congress passed an inheritance tax act whereby it classed brothers and sisters with lineal kindred, and taxed them one per cent, while these relatives by marriage were classed with strangers to the blood and taxed six per cent. During the recent Spanish war, Congress passed an inheritance tax act, whereby it classed brothers and sisters with lineal kindred taxing them three-fourths of one per cent, while these relatives by marriage were classed with strangers to the blood and taxed five per cent. There are twenty-nine

states of this Union, aside from California, having collateral inheritance tax laws at the present time. (*Quarterly Journal of Economics*, Aug., 1904.) With a single exception (Maine) we believe that not one of these twenty-nine states, in its legislation discriminates in favor of these relatives by marriage as against brothers and sisters. Many states, such as New York and Massachusetts, place brothers and sisters and these relatives by marriage in a class with lineal kindred and exempt them from taxation. Other states, such as Missouri, classify brothers and sisters, these relatives by marriage, and certain lineal kindred, together, and tax them; while still other states, such as Washington, follow the classification made by Congress, and place these relatives by marriage with strangers to the blood. *We confidently urge that the decision of the legislatures of twenty-eight states of this Union, considered in conjunction with the three decisions of the Congress of these United States, when placed in the balance against the decision of two State Legislatures, must direct this Court to the true rule.*

In 1888 Connecticut enacted a collateral inheritance tax law following the Maine law in its classification of persons, thus discriminating against brothers and sisters; but in 1893 the State amended the law by naming brothers and sisters in the class exempted, thus placing itself in line with the legislation of the other states upon this question. *And we now call attention to the fact that since this case has been pending in this Court, the California Legislature has revised its collateral inheritance tax law; which revision*

in its classification of persons to be taxed provides as follows:

> "Subdivision 2. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister, or a descendant of a brother or sister of the decedent, the wife or widow of a son, or the husband of a daughter of the decedent, at the rate of one and one-half percentum of the clear value of such interest in such property."
>
> Statutes 1905, p. 341.

By this legislation California has again placed herself in line with the legislation of practically all other states in the Union, and has placed herself where she stood after the act of 1893 and prior to the amendment of 1899.

This legislation of the country as a whole, is more convincing than argument, and more persuasive than legal precedent. We say that all of this legislation, collectively, is a decision of overwhelming force, at least, to the effect that these relatives by marriage have no *greater* moral claim, no *greater* equity, no *greater* right to take the dead man's estate freed of the burdens of this tax, than have that dead man's brothers and sisters. These various legislative declarations as to the true rule are *stare decisis* of the most controlling character. In passing each and all of these laws, both Congress and the State Legislatures had to squarely meet this question and decide it; and always and everywhere they decided it contrary to the way the California Legislature decided it. It is unbelievable that all of these legislative bodies, in decid-

ing this question, would have decided it as they did, if a classification discriminating in favor of these relatives by marriage as against brothers and sisters is based upon reasonable ground—based upon some difference which bears a just and proper relation to the attempted classification—is supported by a "fair reason".

PRESUMPTIONS TO SUPPORT THE VALIDITY OF LEGISLATIVE ACTION.

Especially is this a case where presumptions in favor of the validity of legislative action will not be indulged in to support the constitutionality of the act here involved. These presumptions may be invoked to support the constitutionality of some State legislation, but that principle of law cannot apply here. Of course, such a presumption cannot be invoked in all cases, for if it could, there would be no constitutional limitation upon legislatures in making classifications. This Court, speaking to this point, by Mr. Justice Brewer in *Gulf, etc. v. Ellis*, 165 U. S. 150-154, said:

> "While good faith and a knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the Fourteenth Amendment a mere rope of sand, in no manner restraining State action."

In this case there can be no undisclosed, no unknown reason actuating the mind of the legislature, which

would justify the placing of these burdens upon brothers and sisters, and exempting these relatives by marriage from those burdens. There was no local environment surrounding the California Legislature at the time this law was passed, which could have justly and properly influenced the creation of this legislation; in the very nature of things, it was impossible. This Court knows the constitutional justification for this legislation—if there be justification for it—as fully and entirely as the California Legislature knows it. This is true, for a classification should be based upon the relative relationship of certain people to the deceased, and that relationship is the same everywhere; climatic conditions cannot effect it, and State lines can make no difference.

Judge Cooley in his *"Constitutional Limitations"*, says:

> "To forbid to an individual or a class the right to an acquisition or enjoyment of property in such manner as should be permitted to the community at large, would be to deprive them of *liberty* in particulars of primary importance to their pursuit of happiness; and those who should claim a right to do so, ought to be able to show a specific authority therefor, *instead of calling upon others to show how and where the authority is negatived.*" (Italics ours.)

In the Magoun case Mr. Justice Brewer used this language:

> "Equality in right, in protection and in burden is the thought which has run through the life of this nation and its constitutional enactments from the Declaration of Independence to the present

> hour. Of course, absolute equality is not attainable, and the fact that a law, whether tax law or other, works inequality in its actual operation does not prove its unconstitutionality. *Merchant's Bank v. Pennsylvania*, 167 U. S. 461. But when a tax law directly, necessarily and intentionally creates an inequality of burden, it then becomes imperative to inquire whether this inequality thus intentionally created can find any constitutional justification."

The tax law at bar is the law described in the foregoing language; and, in such a case the learned Justice declares that there is no room for the indulgence of presumption to support the constitutionality of the act. As we have seen, this law was passed for the single purpose of taxing brothers and sisters; it is therefore a tax law which "directly, necessarily and intentionally creates an inequality of burden".

THE FOURTEENTH AMENDMENT.

While this Court said in *Missouri, Kansas & Texas Ry. Co. v. May*, 194 U. S., 267-270, that "great constitutional provisions must be administered with caution", and that "Legislatures are, to a great degree, the ultimate guardians of the liberties and welfare of the people"; still we may be allowed to suggest that the Fourteenth Amendment of the Federal Constitution was adopted for a purpose—it was a necessity of the times.

Its birth conclusively evidenced a recognition from the whole country that State Legislatures do deny to

persons the equal protection of the law. And no Legislature, by adroit legislative classifications, should be allowed to classify persons out of the equal protection of the law; it is the highest duty of this Court to condemn all attempts of that kind.

It is well said in *Smyth v. Ames,* 169 U. S. 466-527:

> "The idea that any legislature, State or Federal, can conclusively determine for the people and for the Courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all Courts, Federal and State, when their jurisdiction is properly invoked, to see to it, that no right secured by the Supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them, depend in no small degree upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."

The whole superstructure of the Constitution is builded upon the principle of equality promulgated by the Fourteenth Amendment—a great amendment which embodies in words the inspiration which permeated this nation at its birth. And that amendment should be administered for the benefit of the people of this great republic, by this Court, in its full integrity—in all its length and breadth and depth.

In *Yick Wo v. Hopkins,* 118 U. S. 366-369, this Court said:

> "No duty rests more imperatively upon the Courts than the enforcement of those constitutional provisions intended to secure that equality of rights, which is the foundation of free government."

THE CALIFORNIA ACT, THE CONGRESSIONAL ACT, AND THE WASHINGTON ACT.

In *Knowlton v. Moore,* 178 U. S. 41, the Spanish War Inheritance Tax Act passed by Congress was before this Court, its constitutionality assailed from every point that the ingenuity and ability of wise counsel could suggest; and after a most exhaustive consideration of that act, this Court held it constitutional at all points. Now we concede that the Fourteenth Amendment does not affect acts of Congress; yet there must be some provision of the Federal Constitution, which forbids Congress from denying to citizens of the United States, the equal protection of the laws. This Court said in

Hibben v. Smith, 191 U. S. 310-325:

> "The Fourteenth Amendment, it has been held, legitimately operates to extend to the citizens and residents of the States the same protection against arbitrary State legislation, affecting life, liberty and property, as is offered by the Fifth Amendment against similar legislation by Congress."

Congress could no more pass a valid inheritance tax law, which alone taxed the privilege of taking estates passing to persons having red hair, than could a State Legislature. And therefore we claim, that when this Court sustained the constitutionality of the Spanish

War Inheritance Tax Act, after the vigorous assault made upon it, and after the exhaustive consideration given it, necessarily it held that the classification of persons made by that act was not arbitrary, but a constitutional classification, and therefore denied to none the equal protection of the laws. It will be remembered that by that classification, brothers and sisters were placed in a class with lineal kindred and taxed three-fourths of one per cent, while these relatives by marriage were placed in a class with strangers to the blood, and taxed five per cent. And we say that if such a classification is based upon reasonable grounds —if such a classification gives to brothers and sisters and these relatives by marriage the equal protection of the law (and we believe that *Knowlton v. Moore* necessarily so decided) then it is impossible that the California Act gives to our clients the equal protection of the law. This conclusion must follow, for the California Act, classifies brothers and sisters with strangers to the blood and taxes them five per cent, and classifies these relatives by marriage with lineal kindred and does not tax them at all; while the Federal Act classifies brothers and sisters with lineal kindred and practically does not tax them at all, and classifies these relatives by marriage with strangers to the blood and taxes them five per cent.

Let us leave the Federal legislation upon this question, and turn our attention to State legislation. The Act of the State of Washington contains the very essence of a logical and therefore constitutional classification. It divides all persons into three classes; (1)

Direct kindred. (2) Collateral kindred. (3) Strangers to the blood. (Session Laws, 1901, p. 68.) It taxes collateral kindred (which includes brothers and sisters) three per cent, and taxes strangers to the blood (which includes sons-in-law, daughters-in-law and widows of sons) six per cent. We confidently aver that if the Washington Act contains a constitutional classification of persons, then the California Act does not contain a constitutional classification; for by the Washington Act brothers and sisters are taxed three per cent and these relatives by marriage six per cent; while by the California Act brothers and sisters are taxed five per cent, and these relatives by marriage are not taxed at all. It therefore follows, as the day the night, that these two acts of California and Washington, respectively, cannot both be constitutional, for they are absolutely antagonistic in principle. If brothers and sisters enjoy the equal protection of the law under the Washington Act, then they do not enjoy the equal protection of the law, under the California Act. If the classification of the Washington Act is based upon reasonable grounds, then it is impossible that the classification of the California Act is based upon reasonable grounds; and if the classification of the Washington Act is based upon differences which bear a just and proper relation to its classification, then it cannot be that the classification found in the California Act is based upon differences which bear a just and proper relation to its classification. If the Washington Act was also here before you today, its constitutionality assailed by reason of its

classification preferring brothers and sisters to these relatives by marriage, then one or the other of these two acts would be declared unconstitutional; and we say, without hesitation, that the Washington Act would be sustained by the Court. The Washington Act would be sustained and the California Act rejected, for the reason that the Washington Act is in line with general legislative usage upon the question; and the California Act is opposed to general legislative usage; for the reason that the Washington Act in its classification of persons is based upon reasonable grounds, and the California Act is not based upon reasonable grounds; for the reason that the Washington Act in principle, in its classification of persons is identical with the Spanish War Inheritance Tax Act, declared valid by this Court; and the California Act, in its classification of persons, in principle, is diametrically opposed to the Spanish War Inheritance Tax Act.

LIMITS OF THE POWER OF TAXATION.

The California Act is a tax law. In *Magoun v. Illinois Trust and Savings Bank*, 170 U. S. supra, this Court, speaking by Mr. Justice McKenna of the general nature and purpose of a similar law—the Illinois Collateral Inheritance Tax Act, said: "Of taxation and the case at bar is of taxation." And Mr. Justice Brewer, in his dissenting opinion in that case, discussing this question more at length, uses this language:

> "That this is a law imposing taxation, is not open to question. The title of the act is 'An act to tax gifts, legacies, etc.', and the first section provides that 'all property * * * which shall pass by will or by the intestate laws of this State * * * shall be and is subject to a tax at the rate hereinafter specified.'"

And we contend that the principle of equality in placing the burdens of taxation upon the people is just as applicable here, as if this were a law creating a direct property tax.

Judge Cooley, in his work upon Taxation, at the very first pages, declares:

> "In an exercise of the power to tax, the purpose always is that a common burden shall be sustained by common contributions, regulated by some fixed general rule and apportioned by the law according to some uniform ratio of equality. The power is not, therefore, arbitrary, but rests on fixed principles of justice which have for their object the protection of the taxpayer against exceptional and invidious exactions, and is to have effect through established rules operating impartially."

Mr. Justice Field, that great jurist, said:

> "Unequal exactions in every form, or under any pretense, are absolutely forbidden; and, of course, unequal taxation, for it is in that form that oppressive burdens are usually laid; it is not possible to conceive of equal protection under any system of laws where arbitrary and unequal taxation is permissible." Vol. 13, Fed. Rep. 733.

Bringing the facts of this case directly home, it may be said that Jones and Smith, by the laws of California, have been granted the right and privilege of taking

the property of the deceased by devolution; yet the privilege of Jones is taxed because Jones is a brother or sister of the deceased, while the identical privilege of Smith is not taxed, because Smith is a son-in-law, daughter-in-law, or widow of a son of the deceased. We say that such a discrimination does not rest upon any fair reason, but that it constitutes an invidious and exceptional exaction opposed to the very foundation principle upon which the right and the power to levy this tax rests.

In *Bell's Gap Railroad v. Pennsylvania*, 134 U. S. 232-237, the limitations upon the power of the State to classify for purposes of taxation, when tested by the Fourteenth Amendment of the Federal Constitution, was the question before the Court; and after giving many illustrations of a valid exercise of the power by the State, the Court, speaking by Mr. Justice Bradley, said:

> "All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature or the people of the State in framing their constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments might be obnoxious to the constitutional prohibition."

We have in this act, clear and hostile discriminations against particular persons and classes, which, as have been shown, "are of an unusual character, unknown to the practice of our governments." Beyond this, we have shown that the regulations here involved do not

proceed within reasonable limits, and are opposed to general usage. Therefore, we have in this act, legislation containing every element which this Court by Mr. Justice Bradley declared, is obnoxious to the Constitution.

INHERITANCE LAWS MUST NOT DISCRIMINATE BETWEEN PERSONS.

The principles of constitutional classification apply to inheritance laws with the same force and effect as they do to other kinds of legislation; and even if it be conceded that the enaction of State collateral inheritance tax laws, does not rest entirely within the sovereign power of the State to levy taxes, but may be classed in part as coming within the exercise of the power of the State to regulate successions, still the legislature must base its classification of persons upon reasonable grounds.

The Court, speaking by Mr. Justice McKenna, in the Magoun Case, at page 292, said:

> "The power of the States over successions may be as plenary in the abstract as appellee contends for, nevertheless it must be exerted within the limitations of the constitution. If the power of devise or of inheritance be a privilege, it must be conferred or regulated by equal laws."

And Mr. Justice Brewer said in the same case:

> "True, the State may regulate, but it has no arbitrary power in the matter. The property of a decedent does not at his death become the property of the State, nor subject to its disposal according to any mere whim or fancy."

We therefore claim that as long as the laws of succession are based upon blood relationship, the right of persons to inherit must be recognized in classifications made, in the order of the respective degrees of relationship; and in view of the rule just quoted from the decision in the Magoun case, *it is apparent that this Court would declare a law of succession unconstitutional, which gave to these relatives by marriage the right of inheritance, which is now given to brothers and sisters.* We say that as long as the principles upon which the right of inheritance in this and every civilized country are now based, stand as the law, no State Legislature has the power to deprive brothers and sisters of this right, and in lieu thereof, give it to these relatives by marriage; and if this cannot be done—if this be forbidden by the Fourteenth Amendment—then there is much more reason for holding that this Amendment forbids the discrimination made by the Collateral Inheritance Tax Law of the State of California.

THE DECISION OF THE SUPREME COURT OF THE STATE OF CALIFORNIA.

With all due deference, we now assert that the Supreme Court of the State of California in the two opinions rendered in this case, and which are set forth in the record, either failed to grasp the question of classification we have urged at all times from the inception of this litigation, or, if the Court did grasp our contention, then it decided the proposition involved contrary to the true rule of law applicable in such cases.

And we affirm that our statement in this regard is borne out to the letter, by a mere casual inspection of the opinions. In the first opinion upon which a rehearing was granted, the Court declared that the rule of law as to constitutional classification, which applied in this case, was the rule of law laid down in the California case of the *City of Pasadena v. Stimson*, 91 Cal. 249, and further declared that rule to be:

> "A law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural, or intrinsic, or constitutional distinction."

In the second opinion rendered by the California Court after rehearing granted, the original opinion was adopted, and the above rule of constitutional classification was expressly readopted. We now assert that the rule of law here declared is fatally defective. We say, that measured by this rule, a legislative classification of persons for the purpose of laying upon them a collateral inheritance tax, would be constitutional, if based upon differences of sex, age, color, or nativity. Sex, age, color, and nativity are perfect illustrations of natural and intrinsic distinctions between persons; yet a classification based upon those distinctions, would be unconstitutional in almost any conceivable character of legislation. Again, there is a natural and intrinsic distinction between children of the deceased, and strangers to the blood, yet no one would have the temerity to say that the children could be taxed, and strangers not taxed.

How the California Court could say that mere, natural, and intrinsic distinctions between persons constitutionally justify discriminations by classification, is beyond our understanding, when that Court, within six months prior to this declaration, in speaking as to the true rule of constitutional classification, used this language:

> "A law which operates only upon a class of individuals is none the less a general law, if the individuals to whom it is applicable constitute a class which requires legislation peculiar to itself in the matter covered by the law. The class, however, must not only be germane to the purpose of the law, but must also be characterized by some substantial qualities or attributes which render such legislation necessary or appropriate for the individual members of the class. It must be founded on some natural, or intrinsic, or constitutional distinction, but the *distinction* must be of such a nature as to reasonably indicate the *necessity* or *propriety of legislation restricted to the class.*
> Rayor v. Superior Court 140 Cal. 476

The rule here declared is the correct one, and in no law book or decision of Court do we find it better expressed. Yet this rule is widely variant from the rule declared by the California Court in the case at bar. To be sure the rule declared in the case at bar is sound as far as it goes, but it only covers the first furlong of the mile course. Again, with all deference to the Supreme Court of the State of California, we deny the correctness of the statement made in the last opinion filed by that Court, to the effect, that the rule of classification declared in the "Magoun Case" and in "Gulf, etc., v. Ellis," is "substantially the same rule" as that declared by the Court in this case. We deny the

correctness of this statement for the reason, that the rule declared by the California Court in this case, wholly omits that vital element found in the rule declared in those cases, and which is absolutely necessary to all constitutional classification; namely, the classification must be one "based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification." The California Court in its opinions made no attempt to show that the classification in this case was based upon *some reasonable ground*, and not the slightest intimation i[illegible]nd in either opinion that it is one based upon differences which bear a just and proper relation to the classification.

For the reasons here urged, we ask the Court to declare the California Collateral Inheritance Tax Act of 1899 void, as violative of the Fourteenth Amendment of the Federal Constitution.

Respectfully submitted,

CHARLES H. GAROUTTE,

WILLIAM N. GOODWIN,

Attorneys for Plaintiffs in Error.

CURTIS H. LINDLEY,

Of Counsel.

ORIGINAL.

Office Supreme Court U. S.
FILED
NOV 17 1905
JAMES H. McKENNEY,
Clerk

No. 70.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

GEORGE O. CAMPBELL, BENJAMIN F. CAMPBELL, CORLISTA E. JESS, and ALONZO E. CAMPBELL, heirs-at-law of Cornelia E. Campbell, deceased,
Plaintiffs in Error,

v.

THE STATE OF CALIFORNIA,
Defendant in Error.

SUPPLEMENTAL BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

CHARLES H. GAROUTTE,
WILLIAM N. GOODWIN,
Attorneys for Plaintiffs in Error.

CURTIS H. LINDLEY,
Of Counsel.

Filed this.....day of.....A. D. 1905.

Pernau Press, S. F.

No. 70.

In the Supreme Court

OF THE

United States.

OCTOBER TERM, 1905.

GEORGE O. CAMPBELL, BENJAMIN F. CAMPBELL, CORLISTA E. JESS, and ALONZO E. CAMPBELL, heirs-at-law of Cornelia E. Campbell, deceased,
Plaintiffs in Error,

v.

THE STATE OF CALIFORNIA,
Defendant in Error.

SUPPLEMENTAL BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

THE COLLATERAL INHERITANCE TAX ACT OF THE STATE OF CALIFORNIA OF 1893 AS AMENDED IN 1899 HAS BEEN REPEALED.

We now suggest to the court that the collateral inheritance tax act of 1893 as amended in 1899 has been repealed by the inheritance tax act of 1905;

and being repealed, and there being no saving clause in the new act, no more inheritance taxes can be collected under the act of 1893 as amended in 1899; and for that reason, the State of California, defendant in error, must fail in this litigation.

Our position is, that the jurisdiction of the Superior Court of the State of California in collateral inheritance tax matters is wholly statutory. Without a statute, the court is absolutely powerless to make any order or decree in collateral inheritance tax matters. Its jurisdiction to collect these taxes came with the act of 1893 as amended in 1899, and necessarily ceased when the act ceased.

Upon March 20, 1905, the legislature of the State of California passed an entirely new inheritance tax act (Statutes 1905, page 341), the title of which reads as follows:

> "An act to establish a tax on gifts, legacies, inheritances, bequests, devises, successions and transfers, to provide for its collection, and to direct the disposition of its proceeds; to provide for the enforcement of liens created by this act and for suits to quiet title against claims of lien arising hereunder; to repeal an act entitled 'An act to establish a tax on collateral inheritances, bequests, and devises, to provide for the collection, and to direct the disposition of its proceeds', approved March 23, 1893, and all amendments thereto, and all acts and parts of acts in conflict with this act."

Among other things, Section 1 of that act provides:

"SECTION 1. All property which shall pass, by will or by the intestate laws of this state, from any person who may die seized or possessed of the same while a resident of this state, or if such decedent was not a resident of this state at the time of death, which property, or any part thereof, shall be within this state, or any interest therein, or income therefrom, which shall be transferred by deed, grant, sale, or gift, made in contemplation of the death of the grantor, vendor or bargainor, or intended to take effect in possession or enjoyment after such death, to any person or persons, or to any body politic or corporate, in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled, in possession or expectancy, to any property, or to the income thereof, shall be and is subject to a tax hereinafter provided for, to be paid to the treasurer of the proper county, as hereinafter directed, for the use of the state; and such tax shall be and remain a lien upon the property passed or transferred until paid and the person to whom the property passes or is transferred and all administrators, executors, and trustees of every estate so transferred or passed shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed. The tax so imposed shall be upon the market value of such property at the rates hereinafter prescribed and only upon the excess over the exemptions hereinafter granted."

Section 27 of this act reads as follows:

"SEC. 27. An act entitled 'An act to establish a tax on collateral inheritances, bequests and devises, to provide for its collection, and to direct the disposition of the proceeds', approved March 23, 1893, and all amendments

thereto, and all acts and parts of acts in conflict with this act are hereby expressly repealed."

(The act of 1899 is amendatory of the act of March 23, 1893.)

Section 30 provides:

"SEC. 30. This act shall take effect and be in force from and after July 1, 1905."

There is no saving clause in this act. It will be observed by an examination of the act that it is a complete and entirely new scheme involving both a direct and collateral inheritance tax. No language could be more plain and direct than Section 27 of the new act, which declares directly and expressly that all other acts "are hereby expressly repealed". Undoubtedly the legislature had the power to repeal all former acts; and undoubtedly by Section 27 it exercised that power. For these reasons we insist that the State of California, defendant in error, has lost all right it ever had to enforce the collection of the collateral inheritance tax involved in this litigation.

Section 167, Sutherland on Statutory Construction, reads as follows:

"SECTION 167. Powers derived wholly from a statute are extinguished by its repeal. All acts done under a statute whilst it was in force are good; but if a proceeding is in progress, in fieri, when the statute is repealed and the powers it confers cease, it falls, for it cannot be pursued. Where a jurisdiction conferred

by a statute is prohibited by a subsequent statute, or the law conferring it is repealed, the jurisdiction ceases, and causes pending at the time fall, and no costs are recoverable by either party, unless saved by provisions of the repealing law."

THE PURPOSE AND INTENT OF THE ACT.

For forty years prior to 1893 the law of California extended to all persons the right and privilege of taking the property of a deceased person either by succession or by will. Under the law of this state during all of that time the property of a person upon his death vested immediately in his heirs and devisees subject to administration (Brenham v. Story, 39 Cal. 185). That principle of the immediate vesting of estates in heirs and devisees had been the law during the entire life of the state prior to 1893. And at that time the state, for the express and only purpose of raising revenue to carry on the school system, established this tax by the act here involved. The state needing revenue, impliedly declared, that having previously granted the valuable right and privilege to its people of taking the property of deceased persons either by will or by succession, it would by this act create a tax upon this valuable right and privilege. This identical principle of taxation is involved in the California corporation tax act of 1905 (Statutes 1905, page 493), which provides for an annual license tax of ten dollars upon every corporation

organized in this state, or doing business therein. The tax is a license or excise tax demanded of all corporations; and the claim or right upon the part of the state to such a tax is based upon the valuable privilege given by it to corporations of doing business in the State. In one case, the State granted the privilege to all persons of taking the property of a deceased person by devise and descent, and subsequently taxed that privilege. In the other case, the State granted to all corporations the privilege of doing business in the State, and taxed that privilege.

AS READ BY ITS FACE, THE ACT OF 1893 AS AMENDED IN 1899 IS AN ACT CREATING A TAX.

In the first place, the act is entitled "An act to establish a tax on collateral inheritances, bequests, and devises, to provide for its collection and to direct the disposition of the proceeds." In the second place, the body of the act, Section One, provides: "After the passage of this act *all property which shall pass* by will or by the intestate laws of this State * * * shall be and is subject to a tax of five dollars on every hundred dollars of market value of such property." In the third place, practically every section of the act in express terms deals with the subject as a "tax" established therein. And it is plain to be seen by the merest inspection that the body of the act as a whole, comprises a

law enacted for the single purpose of raising revenue for the benefit of the public schools of the State.

TESTED BY THE LAW OF THE COUNTRY, THE ACT OF 1893 AS AMENDED IN 1899 IS A TAXATION ACT.

In a case relied upon by the State, namely, United States v. Perkins, 163 U. S. 625, this court, in the very beginning of the opinion, laid down the question presented for its decision as involving a tax in this language:

> "The case really presents two questions. One, whether it is within the power of the State to tax bequests to the United States; two, whether under these statutes the United States are a corporation exempt by law from taxation."

And we submit that the effect of that decision as authority is measured by the propositions involved in the case as declared by the court.

Mr. Justice Brewer, in speaking of the general character of the Illinois collateral inheritance tax act, an act identical in principle with the California act, in Magoun v. Illinois Trust & Savings Bank, 170 U. S. 301, said:

> "That this is a law imposing taxes is not open to question. The title of the act is 'An act to tax gifts, legacies, etc.,' and the first section provides that 'all property * * * which shall pass by will or by the intestate laws of this State * * * * shall be and is subject to a tax at the rate hereinafter speci-

> fied.' * * * But whatever may be the power of the legislature, it had regulated the matter of descents and distribution, and had granted the right of testamentary disposition. And now by this statute upon property passing in accordance with its statutes a tax is imposed."

And in the same case Mr. Justice McKenna, speaking for the court as to the general character of the Illinois tax act, said:

> "Of taxation, and the case at bar is of taxation."

In Plummer v. Coler, 178 U. S. 115, a case relied upon by opposing counsel involving the collateral inheritance tax law of New York, after a review of practically all the cases involving collateral inheritance tax laws, it is said:

> "We think the conclusion fairly to be drawn from the State and Federal cases is that the right to take property by will or descent is derived from and regulated by municipal law; that in assessing a tax upon such right or privilege the State may lawfully measure or fix the amount of the tax by referring to the value of the property passing."

Dos Passos, the leading specialist in this country upon collateral inheritance tax legislation, uses this language in his work upon inheritance tax laws, at page 5:

> "The theory of the promoters of direct inheritance and collateral tax legislation is based upon both logical and legal ground, i. e., that what is generally understood as the right to take by will or from intestates is, after all, but

> a mere privilege of a municipal law, to be changed, modified or repealed in the discretion of the State, and not a natural right, and that it is only just and proper, in consideration of this privilege, that property passing by will to lineals and collaterals, remote, relatives, strangers to the blood, and corporations, or through intestate laws, to collaterals and relatives having for the most part no particular claim whatever upon the decedent, should pay to the State conferring this valuable privilege, a fair and reasonable bonus or percentage upon the value of the property thus transmitted and received."

And this learned author uses this language at page 37 of his Text Book:

> "With the exception of Curry v. Spencer (61 N. H. 624) the constitutionality of the inheritance tax as a tax upon the privilege or right of inheritance, or as an excise, has not been seriously questioned."

At page 38 this learned author says:

> "Under recent decisions in New York construing the transfer tax act passed in 1892, notwithstanding the various changes in phraseology contained in the new act, the nature of the tax is not changed, and it is still a tax upon the privilege or right of succession by will or intestacy."

In the Estate of Wilmerding, 117 Cal. 281, this court declared the collateral inheritance tax act of 1893 to be a tax act. It was there contended that it should be construed and tested in the light of the

inheritance laws of the State of California, and the court said:

> "Similar statutes have been enacted in other states, and with the exception of New Hampshire, have been sustained by the courts of those States, upon the ground that the charge thus imposed is in the nature of an excise tax, or a tax upon the right of succession, and is within the constitutional power of the legislature. * * * There is, however, no necessary connection between inheritance and taxation, and in making laws relating to these two subjects the legislature is not required to construe them together. Having plenary authority in reference to each, it is not required to shape its legislation concerning one in the form or in regard to the manner in which it has shaped it concerning the other."

In speaking of the collateral inheritance tax act of 1893 the Supreme Court of California used this language in Estate of Campbell, 143 Cal. 627, the case here pending:

> "The statute in question imposes an inheritance tax upon all the collateral relations of the deceased, and exempts from taxation the father, mother, husband," etc.

In Eyre v. Jacobs, 14 Grat (Va.) 427, the court said:

> "The intention of the legislature was plainly to tax the transmission of property by devise or descent to collateral kindred; to require that a party thus taking the benefit of a civil right secured to him under the law, pay a certain premium for its enjoyment."

In State v. Hamlin, 86 Maine 494, the court said:

> "The tax provided for in the statute under consideration is clearly an excise tax. The whole tenor and scope of the act is one of excise and not a tax upon property, as that term is used in the constitution. It is not laid according to any rule of proportion, but is laid upon interests specified in the act. * * * The tax under said statute is once for all an excise or duty upon the right or privilege of taking property by will or descent under the law of the State."

THERE IS NO VESTED RIGHT IN THE STATE TO THIS TAX AT THE DEATH OF DECEDENT.

It is claimed by counsel for the State that this tax, by mere force and effect of the following words of the act, becomes a vested right in the State instanter upon the death of the decedent:

> "SECTION FOUR. All taxes imposed by this act, unless otherwise herein provided for, shall be due and payable at the death of the decedent."

The words "due and payable" as here used have not the same signification as when used in referring to a promissory note. For it is impossible in fact that this tax can be "due and payable" at the moment of death. A chose in action to be "due and payable," in the popular and legal sense of the phrase, implies that a certain sum is due and that there is some one upon whom rests the duty of immediate payment. But we ask: How can

this tax be "due and payable" in this sense? The act itself contemplates at least that the tax cannot be paid until an administration has been begun upon the estate. The act contemplates that the tax cannot be paid until it is determined who are the heirs and devisees; for until it is determined who the heirs and devisees are, it is impossible to ascertain whether or not there is any tax. The determination of this question is a condition precedent to the payment of the tax. Likewise the determination of the amount of the tax, which includes the valuation of the property, must be had before the tax can be paid; or in other words, before it can be due and payable, in the popular and legal sense of that phrase. These things are all apparent from the face of the act itself. We say, therefore, that is tax, under the very provisions of the act, cannot be "due and payable," in the ordinary and popular and legal sense of that phrase, until it has been fixed by the court. And this phrase "due and payable" is used in this act for a wholly and entirely different purpose. It is used in the sense and for the purpose of fixing the time when the period of six months begins, within which a payment of the tax entitles the party paying to a discount of five per cent. It is also used in the sense of fixing the time at which the penalties begin to accrue. It is also used in the sense of fixing the time when the lien for the tax attaches upon the property; that is, the moment the tax is fixed, then the lien attaches as of the day of the death.

Dos Passos in his work on collateral inheritance taxes says at page 423:

> "Where, however, the statute under which it is sought to collect the tax has not merely been amended but absolutely repealed and the remedy taken away, all proceedings under the prior act fall, and the tax cannot afterwards be collected."

In Blackwell on Tax Titles, Section 1047, it is said:

> "Inchoate rights derived under a given law are lost by its repeal, unless expressly saved; but rights vested before the repeal are not affected by it. It is a well established principle of law, that when a statute is repealed it must be considered as to transactions in fieri closed—as never having had an existence at all. This rule is subject to exceptions: (1) Where existing rights and remedies are expressly saved by the repealing clause; and (2) where the rights have become perfected and vested under the old law, the repealed statute is regarded as in full force, notwithstanding its repeal. In the former case the old law is regarded as in full force, because the legislature has so declared, and its authority is amply sufficient to accomplish that intention; and in the latter instance, where a right has become vested, it is not within the scope of legislative power to divest it by repeal of the statute under which it was acquired. The general rule is illustrated by the case of MacQuilken v. Doe, where the land in question was sold November 4, 1824, for the State, under the law of 1822, which was repealed September 1, 1824, after the assessment of the tax, but before the sale took place. The repealing law contained this clause: 'Saving, however, any

act done, etc., previous to the passage of this act, etc.' The court held the sale was void, saying: 'The road law being thus repealed, the case is without difficulty. The law is well settled that when a statute is repealed, it must be considered, except as to transactions past and closed, as if it had never existed. The case before us is one where a statute requiring a certain tax to be collected, and prescribing the mode of its collection, was absolutely repealed, at least two months before the sale in question to enforce the payment of the tax was made, and we hold that such sale, and all the proceedings for the collection of the tax, after such repeal, were void.' "

In Desty on Taxation, Vol. 1, page 9, it is said:

"The repeal of a tax law before collection of the tax, puts an end to the tax itself, unless rights are reserved in the repealing act."

THIS TAX ACT DOES NOT CREATE A VESTED RIGHT.

Sutherland in his work on Statutory Construction, Section 164, defines a vested right as follows:

"When a right has arisen on a contract or a transaction in the nature of a contract authorized by a statute, and has been so far perfected that nothing remains to be done by the party asserting such right, the repeal of the statute will not affect it, or an action for its enforcement."

Under this definition we see that a vested right must be, (1) authorized by a statute; (2) it must have arisen in a contract or a transaction in the

nature of a contract; and (3) it must have been so far perfected that nothing remains to be done by the party asserting it.

As to the tax here involved the statute in force at the death provided that

> "all property which shall pass by will or by the intestate laws of this State from any person who may die seized or possessed of the same * * * to any person or persons * * * other than to and for the use of his or her father, etc., * * * shall be and is subject to a tax of five dollars on every hundred dollars of the market value of such property," etc.
>
> Section 1, Act March 23, 1893, page 193.

It must therefore be conceded that a tax based upon the value of the property passing to the heirs was authorized by the statute in force at the time of death. But does that tax arise on contract or a transaction in the nature of a contract? Or had the right to that tax been so far perfected that nothing remained to be done by the party asserting it at the time of the repeal? We answer both of these enquiries in the negative.

In Desty on Taxation, Vol. 1, page 9, it is said:

> "Taxes are positive acts of government, through its various agents, binding upon the inhabitants, and to the making and enforcing of which their personal consent individually is not required. Taxes are not founded on contract, but owe their existence to the action of the legislature, and do not depend for validity upon individual assent, but operate in invitum. * * * A tax is not founded on contract, and

> does not establish the relation of debtor and creditor between the tax payer and the State. It is not an obligation or debt based upon or arising out of an implied contract. A municipal tax, in its essential characteristics, is not a debt, or in the nature of a debt in its mode of collection."

From these authorities it necessarily follows that the tax here asserted to be a vested right, arises neither out of contract nor a transaction in the nature of a contract. Therefore it fails to possess the second element necessary to a vested right as defined by Sutherland.

THE FLANNIGAN CASE.

The case of Flannigan v. Sierra County, decided by this court, and reported in 196 U. S. at page 553, seems to us conclusive against the contention that this tax vested at death to such an extent as to be unaffected by the repeal of the statute authorizing it.

The facts in the Flannigan case were these: On the 31st day of May, 1900, the Board of Supervisors of Sierra County passed an ordinance "that each and every person, co-partnership, firm or corporation engaged in the business of raising, grazing, herding or pasturing sheep in the County of Sierra, State of California, must annually procure a license therefor from the license collector, and must pay therefor the sum of ten cents for

each sheep or lamb owned by, in the possession or under the control of such person, co-partnership, firm or corporation, and used in such business in said county."

The ordinance was in force and effect when defendant grazed his sheep in the county and he thereby brought himself within the purview of its provisions. The tax was due and payable as soon as he carried on the business of grazing sheep within the county. The ordinance provided for the commencement of a civil suit to enforce the payment of the tax, and that suit had been commenced at the time the act of 1897 was repealed.

So we see that the identical question presented in this case was presented there. That was a tax for revenue purposes. This is admittedly a tax for the same purpose. There the tax was due and payable. Here it is claimed the tax is due and payable. There an action was authorized to be brought for the collection of the tax, which action had been commenced. There the power to pass such an ordinance as was in question was repealed by implication. Here the law which declares the tax and provides for its collection is expressly repealed.

Upon the facts presented in the Flannigan case the Circuit Court held with counsel's contention that the right to the tax was so far vested as to be unaffected by the repeal, and this view was affirmed

by the Circuit Court of Appeals. This court in reversing that decision says:

> "The ordinance in controversy in the case at bar was, at least, assumed by the Circuit Court of Appeals to be a revenue measure. This being its character, what was the effect of its repeal?"

The tax here is admittedly a tax for revenue purposes. It is repealed, and the same question is here presented: What is the effect of that repeal upon the tax?

Answering this question the court continuing, says:

> "It withdraws the power of collecting the tax, petitioner contends. The Court of Appeals did not take this view. The court regarded the right of the county as vesting at the date of the imposition of the license, and that the liability of petitioner was so far contractual as to be unaffected by the repeal of the statute giving power to the county to enact the ordinance. We are unable to assent to this view. It is disputable under the authorities, and it is opposed to the decisions of the Supreme Court of the State of California. The general rule is that powers derived wholly from a statute are extinguished by its repeal. Sutherland on Statutory Construction, Section 165. And it follows that no proceedings can be pursued under the repealed statute, though begun before the repeal, unless such proceedings be authorized under special clause in the repealing act. 9 Bacon's Abridgement, 226. This doctrine is oftenest illustrated in the repeal of the penal provisions of statutes. It has however, been applied by the Supreme Court

> of the State of California to the repeal of the power of counties to enact ordinances for revenue."

The opinion then reviews the California decisions, and concludes by saying:

> "If we should yield to the contention of counsel we should give greater power to one of the municipalities of the State than the law of the State, as construed by the Supreme Court of the State, would give it. We should enforce against petitioner a tax which the Supreme Court of the State, construing a State law, would not enforce. The result of the contention indicates its error."

THE NEW YORK CASES.

As is well known the collateral inheritance tax law of 1893 was copied almost verbatim from the New York statute of 1885 and its amendments. See Chapter 483, Laws of New York, 1885, and Amendments 1887, Chapter 713. And in determining whether or not anything remains to be done after the death of the decedent to perfect the State's right or interest in the tax, the decisions of that State and the construction put upon its act are very important.

In the Estate of Mac Pherson, 104 N. Y., the Court of Appeals, at page 321, says:

> "This tax is imposed according to the value of the legacy and collateral inheritance liable to be taxed, and hence there must be some mode of ascertaining that value; and for that pur-

pose judicial notice is required at some stage of the proceeding before the liability of the tax payer becomes finally fixed. He must have some kind of notice of the proceedings against him, and a hearing or an opportunity to be heard in reference to the value of his property, and the amount of the tax which is thus to be imposed. Unless he has these, his constitutional right to due process of law has been invaded."

In the matter of Western, 152 N. Y., page 99, the court says:

"The litigation over the probate of the will of the decedent was finally determined by the decision of this court May 21, 1895, in favor of the contestants. It was not until the final determination of the controversy by the judgmem of this court that it could be known whether the property of the decedent passed under his will, or as in cases of intestacy; and until this fact was ascertained it was impractical to proceed to fix the transfer tax under the act of 1892, or the prior statutes, *since ascertainment of the persons entitled to the property of a decedent must precede the imposition of any tax.* This has been the uniform construction given by this court to transfer tax acts. It has been steadily maintained that the tax, while in a general sense is a tax on property of a decedent, is in its essential nature, under the legislation of the State, a tax on the right to succession of the property, imposed upon and collectible out of each specific share or interest given by law or delivered under the statutes of descent and distribution, and limited as to each share or interest to its value, with a superadded personal liability for the payment of the tax by the person taking the interest. The tax is computed not on the aggregate valuation of the whole

> estate of the decedent considered as the unit of taxation, but on the value of the separate interests into which it is divided by the will or by the laws of the State, and is a charge against each share or interest according to its value and against the person entitled thereto."

In the Arnett Estate, 2 N. Y., Supp. page 42, the District Attorney moved for an order that the tax be paid, although no proceeding had been taken to ascertain its amount. In denying the motion the court said.

> "Of course the motion of the District Attorney for an order for the payment of the tax was properly denied. The tax had not been assessed; the property had not been appraised (Section 13). There had been no citation to the persons interested in the property and liable to the tax, to appear and show cause why said tax should not be paid (Section 16). Several things were wanting to give the surrogate jurisdiction to order the payment of the tax."

THE JOLIFFE CASE.

Steamship v. Joliffe (2nd Wall. U. S. 450) in principle is a case very similar to the case at bar. That was an action brought in a State court by a pilot against a steamship company to recover pilotage fees under an act of the legislature of the State of California. Pending the hearing of the case in the Supreme Court of the United States, the act under which the litigation was inaugurated

was repealed by the State legislature. Mr. Justice Field, writing the opinion for a majority of the court, held that a quasi contract was created between the pilot and the steamship company under the circumstances of the case and the act of the legislature, and for that reason the pilot had a vested right which could not be vacated by a repeal of the law. The language of the majority of the court in this respect is as follows:

> "If the services tendered are declined, the half fees are allowed by way of compensation for the exertions and labor made by the pilot in placing himself in a position to render the services, which in the majority of cases would be required. The transaction in this latter case between the pilot and the master or owners cannot be strictly termed a contract, but it is a transaction to which the law attaches similar consequences; it is a quasi contract."

It is very evident from the language of the court that if the transaction had not been construed as a quasi contract, the court would have held the remedies of the pilot to have been nullified by the repeal of the act.

Mr. Justice Miller, in that case, speaking for the minority of the court, held that the transaction did not amount to a quasi contract, and that the repeal of the law pending the decision of the case by the Supreme Court of the United States deprived the pilot of the statutory right to recover his fees which he had prior to the repeal. The

language of the learned justice in this respect is squarely in point here, and is as follows:

> "There was a preliminary point, however, raised by the Attorney General of California, much pressed and well argued on both sides, on which I had hoped the case would have been decided without reaching the question just stated; a point I think well taken, and fully sustained by the authorities. The proposition is, that the statute of California, under which plaintiff below recovered his judgment, has been repealed since the writ of error was sued to this court; and that the action being wholly dependent on the statute, the repeal takes away the right, and the judgment which he has obtained must be reversed, and the case dismissed. That the 26th section of the act of April 4th, 1864, does, in express terms, repeal the act under which plaintiff's proceeding was instituted, is not denied. It is equally clear that there is no clause in the act of 1864 saving rights which had accrued under the act repealed. I take the law to be well settled that a right of action not growing out of contract, but which is solely dependent upon a statute, ceases and determines with the statute on which it depends."

THE REMEDY PROVIDED BY THE ACT OF 1893 FOR THE COLLECTION OF THE TAX IS REPEALED, AND THE TAX CANNOT BE COLLECTED.

In the estate of Stanford, 126 Cal. 112, the inheritance tax act here involved was before the court, and upon page 120 of the opinion there rendered it is conceded by the majority of the court that if the act had been repealed pending that liti-

gation, there would have been no means left for the collection of the tax. And in the dissenting opinion of Mr. Justice Harrison rendered in that case, it is said:

> "The right of the legislature to repeal the entire act cannot be questioned, and upon such repeal without any saving clause there would be no statute authorizing the collection of any portion of the tax then unpaid, and the tax could not be collected."

In Napa State Hospital v. Flaherty, 134 Cal. 317, Mr. Commissioner Cooper, speaking for the court said:

> "If we were to concede, as claimed by appellant's counsel in their opening brief, that the entire act of 1899 was repealed by the act of 1897—and this court has very strongly so intimated in People v. King, 127 Cal. 574—then the right to recover of defendant is lost. It is a rule of almost universal application, that, where a right is created solely by a statute, and is dependent upon the statute alone, and such right is still inchoate, and not reduced to possession, or perfected by final judgment, the repeal of the statute destroys the remedy, unless the repealing statute contains a saving clause (Sutherland on Statutory Construction, Secs. 162, 163; Endlich on the Interpretation of Statutes, Sec. 478, and cases in notes). It was said by Tindal, C. J., in Kay v. Goodwin, 6 Bing. 476, 4 Moore & P. 341, that the effect of repealing a statute is to 'obliterate it as completely from the records of the Parliament as if it had never passed; and it must be considered as a law that never existed, except for the purpose of those actions which were com-

menced, prosecuted, and concluded whilst it was an existing law.' "

In City of Sonora v. Curtin, 137 Cal. 589, the court, speaking by Mr. Commissioner Cooper, said:

> "The right is given by the ordinance to bring a civil suit to recover the amount so made a license tax. This civil remedy was created by the ordinance, and the remedy is repealed by the repeal of the ordinance as to revenue. In speaking of the rule as to enforcements of rights under repealed statutes, Endlich on Interpretation of Statutes (Sec. 480) says: 'The same rule applies to rights and remedies founded solely upon statute, and to suits pending to enforce such remedies. If at the time the statute is repealed, the remedy has not been perfected or the right has not become vested, but still remains executory, they are gone."

In Gorley v. Seawell, 77 Ind., page 318, it is said:

> "The general rule is that the repeal of the statute under which the taxes are levied, puts an end to the right to collect them, unless the repealing statute contains a provision reserving the right to collect them."

In Hamden v. Commonwealth, 19 Penn. St. 329, it is said:

> "The right to recover as well as the obligation to pay assessments is extinguished by the repeal of the statute authorizing the assessment."

In Santa Monica v. Guidinger, 137 Cal. 659, the court in banc used this language:

> "The arguments of counsel are addressed wholly to the original validity of the ordinance; but under the view we take of the case, this need not be considered. From the title of the ordinance, the absence of regulatory provisions, the amounts of the several taxes imposed, and the nature of the particular subject of taxation involved here, it is clear that the license tax in question was imposed for purpose of raising revenue. The case is therefore substantially similar to that of the City of Sonora v. Curtin (ante p. 583), just decided, and it must therefore be held on the authority of the decision in that case that the license tax in question was repealed, and the right of action therefor extinguished by section 3366 of the Political Code (added thereto by the act of March 23, 1901, Stats. 1901, p. 635."

There is some language used by this court in Perkins v. United States, Supra, following a few early Louisiana decisions, to the effect that the state, under this inheritance tax law, takes a five per cent interest in the estate of deceased persons. Of course, if this be true, then these laws are not laws creating taxes, but are pro tanto, laws of inheritance and devise. This position is undoubtedly unsound, as fully established by the later authorities we have heretofore quoted; as for example, the quotation we have taken from the decision in Plummer v. Coler, Supra, is absolutely conclusive against this position. These laws are tax laws, and were never intended to serve any other purpose.

If the State immediately upon the death of the deceased, takes five per cent of the estate, that is an undivided one-twentieth interest in the property, then a father by his will could not leave to his son his gold watch or the family portraits.

We ask, for the reasons here suggested, that the judgments of the Supreme Court of the State of California and of the Superior Court of the City and County of San Francisco, rendered in this case, be reversed, and that it be declared by this court that plaintiffs in error go free of this tax.

Very respectfully submitted,

Attorneys for Plaintiffs in Error.

Of Counsel.

Service by copy &c.
filed this 9th day
Nov 1905

U. S. Webb. E. B. Power
Lewis F. Byington & Jno. J. Harris
Attys for Defendants in Error

FILE COPY.

Office Supreme Court U. S.
FILED
OCT 30 1905
JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

(October Term, 1905.)

GEORGE O. CAMPBELL, BENJAMIN F. CAMPBELL, CORLISTA E. JESS, AND ALONZO E. CAMPBELL, HEIRS-AT-LAW OF CORNELIA E. CAMPBELL, DECEASED,
Plaintiffs in Error,

VERSUS

THE STATE OF CALIFORNIA,
Defendant in Error.

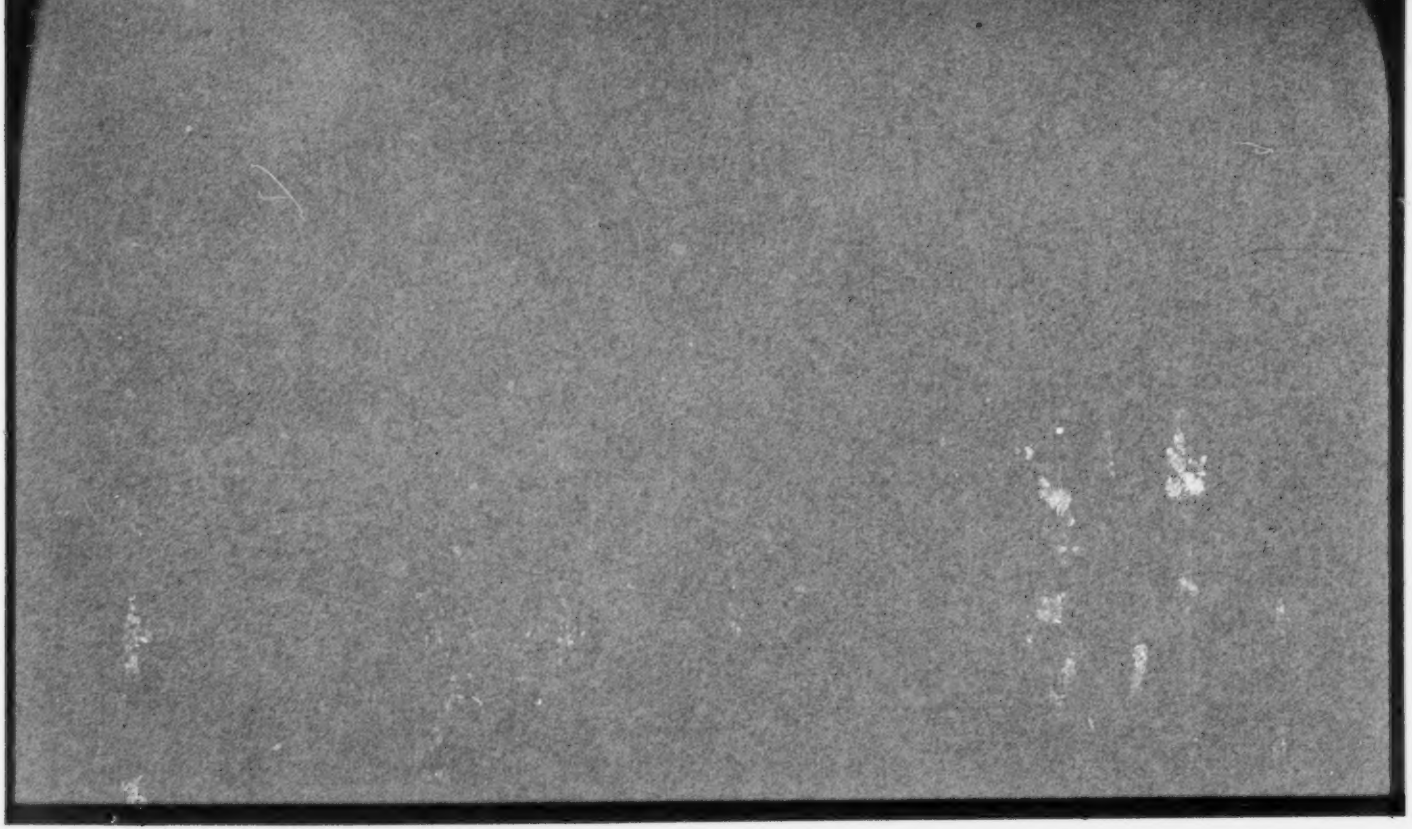
No. 70.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

U. S. WEBB,
Attorney-General of the State of California,
E. B. POWER,
Deputy Attorney-General,
LEWIS F. BYINGTON,
District Attorney of the City and County of San Francisco, State of California,
I. HARRIS,
Assistant District Attorney,
Attorneys for Defendant in Error.

Filed this ..... day of ..... , 1905.

STATE PRINTING OFFICE,
SACRAMENTO.



CONTENTS.

PAGE.

The rule of constitutional classification adopted by the Supreme Court of the State of California and applied to this case is the correct rule and is supported by the decisions of this court 1

No right guaranteed by the Fourteenth Amendment is invaded by the Act here in question 7

The classification for the purpose of the inheritance tax need not necessarily be based upon blood relationship 9

IN THE SUPREME COURT OF THE UNITED STATES.

(October Term, 1905.)

GEORGE O. CAMPBELL, BENJAMIN F. CAMPBELL, CORLISTA E. JESS, AND ALONZO E. CAMPBELL, HEIRS-AT-LAW OF CORNELIA E. CAMPBELL, DECEASED,

Plaintiffs in Error,

VERSUS

THE STATE OF CALIFORNIA,

Defendant in Error.

No. 70.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

I.

The rule of constitutional classification adopted by the Supreme Court of the State of California and applied to this case is the correct rule and is supported by the decisions of this Court.

The language of Mr. Justice Shaw upon this subject, in the original opinion written in this case, is as follows:

"There have been many decisions in this Court upon the general question involved. The leading case upon the subject is the *City of*

> *Pasadena* vs. *Stimson*, 91 Cal. 249, in which case the general principle was laid down that a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural, or intrinsic, or constitutional distinction. A further qualification has been made in the case of *Darcy* vs. *Mayor*, 104 Cal. 642, to the effect that the classification must not be arbitrary for the mere purpose of classification, in order that the legislation really local or special may seem to be general, but that it must be for the purpose of meeting different conditions naturally requiring different legislation. We are of the opinion that this case comes within the first rule, and not within the qualification last stated."
>
> *Estate of Campbell*, 143 Cal. 623-627.

This language, we submit, embodies the correct rule of constitutional classification as laid down by the decisions of the Supreme Court of the United States and also as established by other decisions of the Supreme Court of the State of California. The first portion of the rule, as there declared, viz:

> "That a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural, or intrinsic, or constitutional distinction,"

must be taken as qualified by the other language of the opinion, which is as follows:

> "But that it (the law) must be for the purpose of meeting different conditions naturally requiring different legislation."

Regarding the opinion in this light, we submit

that the rule established is identical with the rule laid down in the case of

De Yoe vs. *The Superior Court*, 140 Cal. 476,

and which counsel admits is the true and correct rule. The language of the *De Yoe* case upon this subject is as follows:

> "It (the classification) may be 'founded on some natural or intrinsic or constitutional distinction,' but the distinction must be of such a nature as to reasonably indicate the *necessity or propriety of legislation restricted to that class.* The classification must not be arbitrary for the mere purpose of classification, but must be founded upon some natural or intrinsic or constitutional distinction which will suggest a reason which might rationally be held to justify the diversity in the legislation."

This statement of the rule is practically the same as that declared by Mr. Justice Shaw in the case at bar, quoted above. In fact, the language of both opinions is practically the same.

The decision in the *Campbell* case is well supported by authority; it cites two cases from the Supreme Court of the State of California in which the same general principle was laid down as a rule of classification, and the same rule of classification is established by the decisions of this Court. In the case of

Magoun vs. *Illinois T. & S. Bank*, 170 U. S. 283,

the Supreme Court laid down the rule in the following language:

> " 'It is apparent that the mere fact of classification is not sufficient to relieve a statute from

the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification. * * *.'"

See, also,

Gulf, Colorado, etc. R. R. vs. *Ellis*, 165 U. S. 150;

Orient Ins. Co. vs. *Daggs*, 172 U. S. 557.

The same rule is also enunciated by the Supreme Court of the State of California in other cases besides those quoted from.

People vs. *C. P. R. R. Co.*, 105 Cal. 576-584;
Ex parte Jentzsch, 112 Cal. 469-474.

We therefore respectfully submit that the rule of classification, as laid down by the Supreme Court of the State of California in this case, is the correct rule, and that no arbitrary classification, as suggested by counsel in his brief, could possibly be sustained under it.

The same subject received consideration by the California court in the case

In re Wilmerding, 117 Cal. 281-286.

In that case the contention of the appellant was that a law which imposed the inheritance tax upon a nephew, while it exempted the brothers and sisters of the deceased, contravened the Constitution of the State in that it was applicable only to a special class of persons arbitrarily selected. The argument, as in this case, was directed to a want of

power in the Legislature to make such discriminations. (See page 285, *Wilmerding* case.)

Speaking of the subject of inheritance and taxation, the Court says (page 286):

> "Having plenary authority in reference to each, it is not required to shape its legislation concerning one in the form or with any regard to the manner in which it has shaped it concerning the other."

And again, on page 287 of the same decision, the Court says:

> "Under its plenary power to designate the kindred of the decedent upon whose right of succession it was proper to impose a tax for the privilege of enjoining this right, it had the right to select the nephews of the decedent. * * *."

On the same page, speaking of differences of relationship as forming a basis of classification for the purpose here involved, the Court says:

> "Such classification would have been in accordance with a natural distinction and upon a matter in which classification is permissible."

If differences of relationship form a natural basis of classification, and the matter of taxing successions is one in which classification is permissible, it is difficult to see why the Legislature may not impose the burden on a class consisting of brothers and sisters, and extend the exemption to another class composed of sons-in-law and daughters-in-law; and if the Court will not interfere with the legislative discretion in making a distinction between brothers and sisters on the one hand, and nephews and nieces on the other, neither will it

disturb that discretion when brothers and sisters are placed in one class, and sons-in-law and daughters-in-law in another, the one subject to and the other exempt from the tax.

There is certainly a natural difference in relationship to the deceased between brothers and sisters on the one hand, and sons-in-law and daughters-in-law on the other; sufficient, at least, to indicate the propriety of legislation restricted to one class or the other; sufficient, also, to "suggest a reason which might rationally be held to justify diversity of legislation." To say that if either of these classes is exempted then both must be, is to deny that there is any natural difference between them; to say that either or both of the classes should be taxed or that they should be exempted, is to deny to the Legislature the discretion with which it is invested in matters pertaining to the propriety and wisdom of legislation. A classification based upon this diversity of relationship can not be said to be arbitrary and made merely for the purpose of classification so that a special law may appear to be general. Such classification is based upon natural and intrinsic distinctions which, while they may not necessarily indicate a positive necessity for, they certainly do suggest the propriety of, different legislation.

We therefore respectfully submit that this case was tested by the correct rule upon the subject, and that the conclusion reached by the California court was sound in holding that the difference of relationship here involved furnishes sufficient justification for the diversity in legislation upon the subject.

II.

No right guaranteed by the Fourteenth Amendment is invaded by the Act in question.

In the case of

Magoun vs. *Bank*, 170 U. S. 283,

Mr. Justice McKenna, after citing numerous authorities and stating the principles upon which inheritance taxes are sustained, says, at page 288:

> "From these principles it is deduced that the States may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective State Constitutions requiring uniformity and equality of taxation."

And at page 294 of the same decision he uses the following language:

> "In other words, the State may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion."

By this decision the Supreme Court of the United States held that differences in relationship form a just and natural basis of classification for the purpose of an inheritance tax, and that in making the classification a wide legislative discretion will be allowed to the States.

Magoun vs. *Bank, supra,* citing
Gulf, Colorado, etc. R. R. vs. *Ellis,* 165 U. S. 150.

Again, at page 301 of the *Magoun* case, Mr. Justice Brewer, speaking on the subject here involved, says:

> "The classification is based upon differences which bear just and proper relation to it, and where classification is rightful, differences in the rate of taxation may be, so far as the Federal Constitution is concerned, permissible."

In the case of

Orient Ins. Co. vs. *Daggs*, 172 U. S. 557,

speaking of the *Magoun* decision cited above, the Court says:

> "We said in that case that 'the State may distinguish, select and classify objects of legislation, and necessarily the power must have a wide range of discretion.' And this because of the function of legislation and the purposes to which it is addressed. Classification for such purposes is not invalid, because not depending on scientific or marked differences in things or persons or in their relations. It suffices if it is practical, and is not reviewable unless palpably arbitrary."

The *Magoun* case, it is submitted, disposes of all question regarding the validity of the Act under the Fourteenth Amendment. It certainly holds, as clearly as language can express, that a classification based upon differences of relationship is valid for the purpose of an inheritance tax, and it accords to the State legislature a wide latitude in the matter of selecting and classifying objects of legislation for this purpose. Nor can the decision be limited to the particular classification before the Court in that case. Any classification based upon differ-

ences "which bear a just relation to it" and which is not "palpably arbitrary" will be sustained as coming within that wide discretion allowed to State legislatures in these matters.

It is submitted that the classification made by the California statute, placing brothers and sisters in the taxed class and sons-in-law and daughters-in-law in the exempt class, is based upon differences of relationship which bear a just and proper relation to that classification, and is certainly not palpably arbitrary, and that, therefore, it meets every requirement and violates no right guaranteed by the Fourteenth Amendment.

III.

The classification for the purpose of the inheritance tax need not necessarily be based upon blood relationship.

Counsel contends that the only proper basis of classification, upon which to justify diversity of legislation respecting the inheritance tax, is blood relationship. The fallacy of this argument may be readily shown. If blood relationship were the only ground of exemption from the tax, then any blood relative, however remote his relationship to the deceased, would be equally entitled to exemption with brothers and sisters; and again, the most remote blood relatives, persons who had never seen the deceased and had no moral claim upon him whatever, would have preference in this matter, not only over the sons-in-law and the daughters-in-law whose relationship to the deceased is certainly very intimate, but they would have claims to exemp-

tion superior even to the husband or wife of the deceased. This would be the logical result of the theory advanced by counsel, and yet there has never been any system of law devised where the husband or wife is not recognized as first in the matter of inheritance, with respect both to succession and to exemption from the tax imposed upon it, and the propriety of such legislation which places the husband and wife in the same class with the very nearest of blood relatives, namely, the children, has, as far as we are aware, never been questioned.

We submit, therefore, that blood relationship is not the only proper basis for the classification here in question, but that other elements may properly enter into it. The classification here is based upon a combination of blood and relationship by marriage. The husband or wife and the son-in-law and daughter-in-law, related by marriage to the deceased, the children and grandchildren related by blood, are included in one class and are exempted; brothers and sisters, nephews and nieces, all of whom are related by blood, together with their respective spouses (who are related by marriage), are placed in another class and compelled to pay the tax. This suggests a basis of classification which, we submit, meets all the constitutional requirements and justifies the Legislature in making a difference with respect to the imposition of the tax. The decedent, with the surviving husband or wife, the children and their respective spouses (sons-in-law and daughters-in-law) may be taken as a complete family group in the domestic scheme; the brothers and sisters of the deceased, their children, who are nephews and nieces of the deceased,

and their respective spouses, are no part of the family group belonging to the deceased, but form an entirely independent one, of which such brother or sister is the head.

We submit that a grouping of this nature, for the purpose of the tax in question, meets all the constitutional requisites, and that the discretion of the Legislature, in making such grouping the basis of the classification for the purpose of the tax, will not be disturbed.

Besides the cases cited above, respondent desires to call the attention of the Court to the following cases, upholding, as constitutional, inheritance tax laws making discriminations between relatives:

U. S. vs. *Perkins,* 163 U. S. 625;
State vs. *Dalrymple,* 70 Maryland, 294;
In re Meriam, 141 N. Y. 479;
State vs. *Hamlin,* 86 Maine, 495;
State vs. *Alston,* 94 Tenn. 674;
Minot vs. *Winthrop,* 162 Mass. 113;
Gelsthrope vs. *Furnell,* 51 Pac. Rep. 267;
Eyre vs. *Jacob,* 14 Grattan (Va.), 428;
In re McPherson, 104 N. Y. 306;
In re Shewrell's Estate, 125 N. Y. 397;
Drake vs. *Kockersperger,* 167 Ill. 122;
Billings vs. *People,* 189 Ill. 472.

And to:

Scholey vs. *Rew,* 23 Wallace, 331;
High vs. *Coyne,* 93 Fed. 451,

sustaining the succession taxes imposed by Acts of Congress in 1866 and 1898, respectively, in which similar principles were involved.

It is respectfully submitted that the portion of the Act here in question be sustained as constitutional, and that this writ of error be dismissed.

U. S. WEBB,
Attorney-General of the State of California,
E. B. POWER,
Deputy Attorney-General,
LEWIS F. BYINGTON,
District Attorney of the City and County of San Francisco, State of California,
I. HARRIS,
Assistant District Attorney,
Attorneys for Defendant in Error.

FILE COPY.

IN THE

Supreme Court of the United States

(OCTOBER TERM, 1905.)

No. 70

Office Supreme Court U. S.
FILED
NOV 24 1905
JAMES H. McKENNEY,
Clerk

GEORGE O. CAMPBELL, BENJAMIN F. CAMPBELL, CORLISTA E. JESS, and ALONZO E. CAMPBELL, Heirs-at-Law of Cornelia E. Campbell, Deceased,

Plaintiffs in Error,

vs.

THE STATE OF CALIFORNIA,

Defendant in Error.

Brief of Defendant in Error

In Reply to Supplemental Brief of Plaintiffs in Error.

LEWIS F. BYINGTON,
District Attorney of the City and County of San Francisco, State of California,

I. HARRIS,
Assistant District Attorney,
Attorneys for Defendant in Error.

Filed this ..... day of ....., 1905.

The James H. Barry Co.

In the Supreme Court of the United States

OCTOBER TERM, 1905

GEORGE O. CAMPBELL, BENJAMIN F. CAMPBELL, CORLISTA E. JESS, AND ALONZO E. CAMPBELL, HEIRS-AT-LAW OF CORNELIA E. CAMPBELL, DECEASED,
Plaintiffs in Error,

vs.

THE STATE OF CALIFORNIA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR IN REPLY TO SUPPLEMENTAL BRIEF OF PLAINTIFFS IN ERROR.

I.

THE ACT OF 1905, EVEN IF IT REPEALS THE ACT OF 1893 AND THE AMENDMENTS THERETO, DOES NOT AFFECT THE RIGHT OF THE STATE TO ITS FIVE PER CENT OF THE ESTATES OF PERSONS WHO DIED PRIOR TO THE FIRST OF JULY, 1905.

A. This point was very fully considered by the Supreme Court of the United States in *Prevost* vs.

Greneaux, 19 How., 1. The State of Louisiana had a statute imposing a tax upon property inherited by non-resident foreigners. While this Act was in force, and prior to 1853, Prevost's decedent died. In 1853, pending administration, and before the payment of the tax, a treaty was negotiated between the United States and France, which provided, among other things, that French subjects should not be compelled to pay any greater taxes in the United States than our own citizens. The Supreme Court held that the liability of persons taking from the estates of decedents dying before the treaty was entered into, was not affected, for the reason that the State's right to the tax vested upon the decedent's death.

The same doctrine was adopted in Louisiana in *Arnaud's Heirs* vs. *His Executors,* 3 (Old Style) La. 215. Subsequently, however, and citing *Prevost* vs. *Greneaux,* the Supreme Court of Louisiana held that the tax upon the inheritances of foreigners could not be imposed, where their decedent died *after the negotiation of the treaty.*

Succession of Arnat, 18 La. Ann. 405.
Succession of Rixner, 48 La. Ann. 563.
Succession of Rabasse, 49 La. Ann. 1413.

B. If we examine the decisions, we find them uniform (whatever names they may use) upon the proposition that "Succession Taxes" are not "taxes," in the ordinary sense of the word, but a mod-

ification of the succession and inheritance laws, decreeing that only a certain percentage of a man's property shall go to his heirs, and the rest shall remain the property of the sovereign State. It is too well settled to require citation that the right to inherit at all is purely a matter of statue; as Blackstone puts it (2 Black., 211), "creatures of civil polity, and *juris positive* merely." In England, prior to the time of Charles II, there seems to have been no method for the distribution of the property of a decedent. In this country, the statutes of descent differ more or less in the different States. In *McNeil* vs. *Congregational Society,* 66 Cal., 105, it was held that the Mexican law of descents, which provided that on the death of the ancestor, his property vested in his heirs ***without administration,*** applied to the estates of persons who died in California prior to the adoption of our own statutes upon the subject. At the present time our Codes contain a comprehensive and complex scheme regulating both the persons who shall take after the death of a decedent, and the means by which the estate shall be given them. It even provides (Civil Code, 1386) that in the absence of certain specified kindred, a man's estate, after his death, shall become the property of the State. So, if the State has always reserved to itself the power to say to whom and by what means the property of a decedent shall descend, it certainly can say also ***how much shall descend.*** And this is what it has done,

in the Collateral Inheritance Tax Act. In other words, the same principle which makes the property of a decedent vest in his heir immediately at death, vests the State with a certain percentage of it at the same time. Supposing that the Legislature (as it would have the undoubted right to do) should enact a statute changing the order of succession. Would it be claimed that one who had been the heir of a person who died prior to this change, and pending probate, would be deprived of his estate? Undoubtedly not, because his right would have vested.

Billings vs. *Hall,* 7 Cal., 1.

It seems equally clear that the right of the State to its share has likewise vested, and cannot be taken away by subsequent enactment.

Estate of Stanford, 126 Cal., 112.

Some cases say that the exaction is not a "tax," but an "excise" on the privilege of taking by succession.

Minot vs. *Winthrop,* 162 Mass., 113.
State vs. *Ferris,* 9 Ohio C. C., 298.
State vs. *Hamlin,* 86 Me., 495.

In the *Matter of the Collateral Inheritance Tax,* 88 Me., 587, it was held that the statute of 1893 of that State did not apply to property devised by a testator who died before the act took effect, but whose

will was not filed in the probate court until after that time.

In *State* vs. *Dalrymple,* 70 Md., 294, it was said: "In other words, one of the conditions upon which strangers and collateral kindred may acquire a decedent's property, which is subject to the dominion of our laws, is, that there shall be paid out of such property a tax of two and one-half per cent into the treasury of the State. This, therefore, is not a tax upon the property itself, but merely the price exacted by the State for the privilege accorded in permitting property so situated to be transmitted by will or by descent or distribution."

The case of *United States* vs. *Perkins,* 163 U. S., 625, quotes *State* vs. *Dalrymple (supra),* the Supreme Court saying: "In this view, the so-called inheritance tax of the State of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases—a declaration that in the exercise of that power he shall contribute a certain percentage to the public use; in other words, that the right to dispose of his property by will shall remain, but be subject to a condition which the State has a right to impose. Certainly, if it be true that the right of testamentary disposition is purely statutory, the State has a right to require a contribution to the public treasury before the bequest shall take effect. Thus, the tax is not upon the property, in the ordinary sense of the term, but upon the right to dispose

of it, *and it is not until it has yielded its contribution to the State that it becomes the property of the legatee.*

If, then, the property does not vest in the legatee until it has yielded its contribution to the State, it must be held that it yields that contribution immediately upon the death, because at that instant the heirs' property in it vests.

Continuing, the Supreme Court say: "We think it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is imposed upon the legacy before it reaches the hands of the Governmnt. The legacy becomes the property of the United States *only after it has suffered a diminution to the amount of the tax,* and it is only on this condition that the Legislature assents to a bequest of it."

II.

If the Act of 1905 Can Be Held to Relieve the Estates of Persons Who Died Prior to the First of July, 1905, It Is to That Extent Unconstitutional.

This is the doctrine of the *Estate of Stanford, supra.* It is idle to say that in that case there was merely an amendment, and no repeal, because the

principle is exactly the same, and the amendment in that case had the effect of a repeal, *pro tanto*.

Estate of Stanford, 54 Pac. Rep., 259.

The same rule is laid down in *Moore's Estate*, 35 N. Y. S., 782.

III.

THE ACT OF 1905, IN SPITE OF THE FORMAL REPEALING CLAUSE, MUST BE HELD TO BE A CONTINUATION OF THE ACT OF 1893 AND ITS AMENDMENTS, IN SO FAR AS IT AFFECTS THE ESTATES OF PERSONS WHO DIED PRIOR TO THE FIRST OF JULY, 1905.

A. An examination of the Act of 1905 reveals that it differs from the Act of 1893, as the latter stood amended, only in that it enlarges the classes subject to the tax, and adopts a different rate. All persons who were required to pay before, are required to pay now, and in addition, other classes of persons are included. So it must be held that it was never the conscious intent of the Legislature to relieve estates which were already subject to the tax. Can it be conceived that the law-making power would so put a premium upon a dilatory compliance with the statute? Could it have been their intention to say that those persons who had paid their tax promptly

should be held, but those who had delayed the payment should be relieved entirely?

B. The general rule is laid down in 26 *Am. & Eng. Enc.* (2nd ed.), 758: "Where a statute is repealed, and its provisions are at the same time reenacted by the repealing act, the effect, according to the great weight of authority, is that the earlier statute is not in fact repealed, but its provisions continue in active operation, so that all rights and liabilities thereunder are preserved and may be enforced."

The authorities, supporting the text quoted, are numerous and respectable, including one from our own Court—*Central Pac. R. R.* vs. *Shackelford,* 63 Cal., 261.

Steamship Co. vs. *Joliffe,* 2 Wall., 450, is also a very strong authority upon the same proposition. That case is also authority for the proposition that where a claim has arisen under a statute, a repeal of the statute does not affect it, nor an action for its enforcement.

We would also call attention to the following quotation from Mr. Walter Rose's excellent Notes on U. S. Reports, Volume 6, page 433, with regard to *Steamship Co.* vs. *Joliffe:*

"Cited and principle applied in *Tinker* vs. *Van Dyke,* 1 Flipp., 524, 526, F. C., 14,058, and *Brooke* vs. *McCracken,* 4 Fed. Cas., 229, where an amendment in the bankruptcy law was held without application to proceedings commenced before its enactment; *Brooks* vs. *Memphis,* 4 Fed. Cas., 287, holding

legislature has no power to repeal only existing remedy to enforce an existing judgment; *Nevada Bank* vs. *Steinmitz,* 64 Cal., 16, 30 Pac., 975, holding repeal of act authorizing the issuing of bonds in aid of railroads, did not affect validity of bonds issued under contract made and partially performed prior to passage of repealing act; *Phillips* vs. *Jollisaint,* 7 Ind. App., 461, 34 N. E., 654, holding act relating to manner of collecting street assessments does not affect remedies attached to accrued liabilities previous to taking effect of such act; *Maine* vs. *Waterville Bank,* 68 Me., 518, and *Appeal Tax Court* vs. *Western, etc., Ry. Co.,* 50 Md., 295, holding, where an assessment has been legally made, an act repealing the act under which assessment was made, does not affect the right to recover the amount of the assessment; *United States* vs. *Williams,* 8 Mont., 93, 19 Pac., 292, holding right of action for cutting timber on public lands in violation of rules of interior department, is not affected by the abrogation of rules under which prosecution was commenced; *Daniels* vs. *Moses,* 12 S. C., 141, and *Garneau* vs. *Port Blakely Co.,* 8 Wash., 471, 36 Pac., 464, where statutory lien has attached it is not affected by repeal of act conferring; *Tufts* vs. *Tufts,* 8 Utah, 146, 147; 30 Pac., 310; 16 L. R. A., 484, where cause of action for divorce was held not taken away by repeal of statute giving right. Cited, *arguendo,* in *Smith* vs. *Chicago, etc., Ry. Co.,* 49 Wis., 448, 5 N. W., 242, and *Graham* vs. *Chicago, etc., Ry. Co.,* 53 Wis., 491, 10 N. W., 616, holding action for illegal excess of charges by carrier, being cause of action at common law, is not affected by repeal of statute making it cause of action."

"Cited and rule relied on in *Bear Lake Co.* vs. *Garland,* 164 U. S., 12, 41 L., 332, 17 S. Ct., 9, and *Sabin* vs. *Connor,* 21 Fed. Cas., 125, in construing statute relating to mechanics' liens; to same effect, in *In re Hope Mining Co.,* 1 Sawy., 712, F. C., 6, 681,

Skyrme vs. *Occidental Co.*, 8 Nev., 233, and *Waters* vs. *Dixie Lum. Co.*, 106 Ga., 595, 32 S. E., 637, all holding that repeal of law after lien has attached does not defeat lien; *Forbes* vs. *Board of Health*, 27 Fla., 194, 26 Am. St. Rep., 65, 9 So., 447, holding, under such circumstances, the repealing act will be considered as an amendment to the old one; *Barton* vs. *Moscow Ind. School Dist.*, 2 Idaho, 1001, 29 Pac., 44, where principle was applied to laws affecting school system; *State* vs. *Brewer*, 22 La. Ann., 277, where criminal statute was construed; *United Hebrew Assn.* vs. *Benshimal*, 130 Mass., 327, holding repeal of general corporation law by statute, substantially re-enacting and extending its provisions, does not terminate existence of corporations organized under it; *Anding* vs. *Levy*, 57 Miss., 59, where one section of repealed statute being re-enacted in repealing statute was held never repealed; to same effect in *Middleton* vs. *New Jersey, etc., Ry. Co.*, 26 N. J. Eq., 274. Approved, *arguendo*, in *State* vs. *Bemis*, 45 Neb., 733, 64 N. W., 350, *Cortesy* vs. *Territory*, 7 N. Mex., 92, 32 Pac., 505, 19 L. R. A., 354, and *Forqueran* vs. *Donnelly*, 7 W. Va., 142. Cited, without particluar application, in *Treat* vs. *Staples*, 1 Holmes, 5, F. C., 14, 162, *Reynolds* vs. *Bowen*, 138 Ind., 450, 36 N. E., 761, *Hess* vs. *Muir*, 65 Md., 605, 6 Atl., 676, and *Pratt* vs. *Swan*, 16 Utah, 491, 52 Pac., 1094. See note 2 Am. Dec., 501; also note collecting authorities 12 Am. Dec., 481."

We would also cite the Court to the following cases on the same point:

McMinn vs. *Bliss*, 31 Cal., 127.
Matter of Davis, 149 N. Y., 345.
Matter of Sloane, 154 N. Y., 113.
Provident Hospital vs. *People*, 198 Ill., 495.

Scrimgeour's Estate, 80 N. Y. S., 636.
Collins vs. *Blake,* 79 Me., 218.
Estate of Prince, 136 N. Y., 347.

IV.

THE TAX CAN BE COLLECTED EITHER UNDER THE OLD STATUTE OR THE NEW, OF UNDER THE GENERAL POWERS OF THE SUPERIOR COURT IN PROBATE MATTERS, OR IT MAY BE COLLECTED BY THE ORDINARY CIVIL ACTION AGAINST THE ESTATE.

A. The general rule is given in 23 *Am. & Eng. Enc.* (1st ed.), 504: "The general rule is that there is no vested right in a particular remedy, unless the remedy is a part of the right itself. Aside from this exception, the Legislature has complete control over the remedy and the mode of procedure. If a repealing statute merely modifies a remedy, or takes away one remedy, leaving another, interests under the statute are not affected, though in the latter case pending suits will be determined. The interests, however, may be enforced under the modified procedure or the remaining remedy."

The special rule, as applied to inheritance tax matters, is given in 27 *Am. & Eng. Enc.* (2nd ed.), 342, as follows: "But the method of procedure for the ascertainment and determination of the liability of a succession to pay the tax is controlled by the statute on the subject in force at the time of the institution of the proceeding."

In *Matter of Vanderbilt,* 2 Connolly, 319, and *In re Prout,* 3 N. Y. Supp., 831, the Courts of New York have decided that the remedies given by the inheritance tax statute of that State are merely cumulative, and not exclusive of the ordinary procedure.

In *State* vs. *Poulterer,* 16 Cal., 531, the rule of *ubi jus* was applied to rights created by statute.

B. If the State is the owner of the amount of the tax at the time of decedent's death, then the executor is as much a trustee for the State as for an heir or devisee. In *Bergin* vs. *Haight,* 99 Cal., 56, it was held that the administrator acts as trustee and agent for the owners of the property, whether such owners are heirs or others. Sections 1665 and 1697 of the Code of Civil Procedure provide that the Court shall cause the property to be turned over "to the parties entitled." In the *Burton case,* 93 Cal., 463, *Pennie* vs. *Roach,* 94 Cal., 521, and *Simons* vs. *Bedell,* 122 Cal., 347, it was held that the Superior Court, sitting in probate, has jurisdiction to determine to whom the property shall go, and in what shares. Certainly, it can inform itself in any proper manner what those shares are, and this is so even in the absence of statute pointing out the particluar procedure by which the Court is to be guided.

But aside from the question as to whether or not the Court, *sitting in Probate,* may devise a proper proceeding for the ascertainment and collection of the amount due the State, it certainly cannot be dis-

puted that the State would have the ordinary remedy by civil action for the enforcement of payment of the amount due to it. If the right rests in the State at the time of the death of decedent, as has been shown above, then the State may claim its own by civil action, even though the remedy in the Probate Forum has been repealed, and even though the Probate Court is without power to devise a proper remedy. The repeal of the remedy in the Probate Court for the collection of the State's share cannot therefore be regarded as in any wise affecting the right of the State to such share, nor the right of the State to resort to the ordinary and usual remedy by civil action for the enforcement of that right.

Respectfully submitted,

L. F. BYINGTON,
District Attorney.

I. HARRIS,
Assistant District Attorney.
Attorneys for Defendant in Error.